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PRACTICE IN PRIZE CAUSES.[1]

THE ordinary prize jurisdiction of the admiralty extends to all captures made on the sea, *jure belli*;[2] to captures in foreign ports and harbors,[3] and in rivers, ports, and harbors of the captors' own country;[4] to captures made on land by naval forces, and upon surrenders to naval forces either solely or by joint operation with land forces;[5] and to money received as a ransom, or commutation, upon such captures.[6] All captures *jure belli*, and all torts connected therewith, are exclusively cognizable in the prize court. Such court has also exclusive jurisdiction as to the question who are the captors, or joint captors, and entitled to share in the distribution, and as to the allowance of freight, damages, expenses, and costs, in all cases of captures; and its decree is conclusive upon all parties.[7] When jurisdiction has once attached, unless it is lost by a hostile recapture, escape, or voluntary discharge,[8] it continues, and the court will follow the captured property, or its proceeds, wherever it may be

[1] The substance of this article is taken from the notes, said to have been written by Judge Story, to Wheaton's Reports, volumes 1 & 2. Appendix.
[2] *The Two Friends*, 1 Rob. 271, 284.
[3] *W. B.* v. *Latimer*, 4 Dall. Appx. 1; *Le Caux* v. *Eden*, Doug. 608; *Lindo* v. *Rodney*, Doug. 613, note.
[4] *Lindo* v. *Rodney*, ubi sup.; *Chinsurah*, Acton, 179.
[5] *Ships taken at Genoa*, 4 Rob. 388.
[6] *Anthon* v. *Fisher*, Doug. 649, note; *Maisonnaire* v. *Keating*, 2 Gallis, 325.
[7] *Home* v. *Camden*, 2 H. Bl. 533; *The Herkimer*, Stewart, 128; *Duckworth* v. *Tucker*, 2 Taunt. 7; *Le Caux* v. *Eden*, Doug. 594; *Smart* v. *Wolff*, 3 T. R. 223; *The Copenhagen*, 1 Rob. 289; *The Betsey*, Ib. 93.
[8] *Hudson* v. *Guestier*, 4 Cranch, 293.

found;[1] as where the property is carried into a foreign port and there delivered upon bail by the captors;[2] or where it is lying in a foreign neutral territory.[3] So, if a prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors or claimants.[4] So, although the property has been sold by the captors, or has passed into other hands;[5] and in proper cases will decree that the parties pay over the proceeds, with interest upon the same for the time they have been in their hands.[6] But the court will not proceed to an adjudication in favor of captors, where there has been a conversion of the captured property by them without necessity or reasonable cause.[7] It may enforce its decrees against persons having the proceeds of prize in their hands, notwithstanding no stipulation, or an insufficient stipulation has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* is found, and is not confined to the remedy on the stipulation.[8] And in these cases the court may proceed upon its own authority, *ex officio*, as well as upon the application of parties.[9] And it may, after sentence pronounced, proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject-matter.[10]

The prize court will entertain suits for restitution and damages in case of a wrongful capture, and will allow damage for all personal torts. It will not confine itself to the actual wrong-doer, but will apply the rule of *respondeat superior*, and decree damages against the owners of the offending vessel.[11] Where the captured crew have been grossly ill-treated, the court will award a liberal recompense.[12] It may decree a forfeiture of the rights of prize against captors, where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. The court is the constitutional guardian of the public interests

[1] *Home* v. *Camden*, 2 H. Bl. 533, S.C., 4 T. R. 382; *Willis* v. *Commissioners*, 5 East. 22; *The Noysomhed*, 7 Ves. 593; *The Louis*, 5 Rob. 146; *The Pomona*, 1 Dod. 25.

[2] *The Peacock*, 4 Rob. 185.

[3] *Hudson* v. *Guestier*, 4 Cranch, 293; *The Cristopher*, 2 Rob. 209; *The Henrick and Maria*, 4 Rob. 43; *The Victoria*, Edward, 97.

[4] *The Susanna*, 6 Rob. 48.

[5] *The Falcon*, 6 Rob. 194; *The Pomona*, 1 Dodson, 25.

[6] *Smart* v. *Wolf*, 3 T. R. 323; *Jennings* v. *Carson*, 4 Cranch, 2; *The Princessa*, 2 Rob. 31; *Home* v. *Camden*, ubi sup. and cases cited.

[7] *L'Eole*, 6 Rob. 220; *La Dame Cecile*, 6 Rob. 257; *The Arabella and Madeira*, 2 Gallis, 368.

[8] Buller, J. in *Smart* v. *Wolf*, 3 T. R. 323, 344; Grose, J. in *Willis* v. *Commissioners*, 5 East. 22, 33; *The Pomona*, 1 Dodson, 25.

[9] *The Herkimer*, Stewart 128, S. C. 2 Hall's Am. Law Journal, 133.

[10] *Home* v. *Camden*, 2 H. Bl. 533, and cases *ubi supra*.

[11] *Del Col* v. *Arnold*, 3 Dall. 333; *The Anna Maria*, 2 Wheat. 327.

[12] *The St. Juan Baptista*, 5 Rob. 33; *Die Firedamer*, Ib. 357; *The Lively*, 1 Gallis, 315.

in relation to matters of prize; and wherever there is any deviation from the regular course of proceedings, there must be a sufficient reason shown for that deviation, before it will give the captors any of the ordinary benefits of prizes captured by them.[1]

The usual course of the court is by way of monition, and if that process be disobeyed, an attachment issues against the parties in contempt. But the court may in all cases proceed in the first instance by warrant of arrest of the person, or property, to compel security to abide its decree.

To enable a vessel to make captures which shall enure to the benefit of the captors, she must have a commission of prize. Non-commissioned vessels of a belligerent nation may make captures in their own defence, and may capture hostile ships and cargoes, without being deemed pirates by the law of nations; but they can have no interest in prizes so captured.[2] Every capture, either by commissioned or non-commissioned ships, is at the peril of the captors. If the vessel and cargo, or any part thereof, are good prize, the captors are justified; and if the property should be, after a hearing, restored, if there was probable cause of capture, they are not responsible in damages, but may, in proper cases, recover their costs and the expenses in bringing in the property for adjudication. If they make captures without probable cause, they are liable in damages and costs. Some of the following circumstances have been held to constitute probable cause for capture, to wit: If the ship pretends to be neutral, and has not the usual documents of such ship on board; if the cargo is without a clearance; if the destination is untruly stated; if the papers respecting the ship or cargo are false or colorable, or suppressed, or spoliated; if the neutrality of the cargo does not distinctly and fully appear; if the voyage be to or from a blockaded port, or not legal to the parties engaged in the traffic; if the cargo be of an ambiguous character as to contraband; and generally, if the case be a case of farther proof.[3]

[1] *The Johanna Tholen*, 6 Rob. 72; *Oswell* v. *Vigne*, 15 East. 70; *The George*, 2 Wheat, 278; *La Reine des Anges*, Stewart 9; *The Cossack*, Ib. 513.

[2] Com. Dig. Admiralty, E. 3. *The Georgiana*, 1 Dodson, 397; *The Diligentia*, Ib. 403; *The Emulous*, 8 Cranch, 131; *The Nereide*, 9 Cranch, 449; *The Dos Hermanos*, 2 Wheat. 76.

[3] *The Anna*, 5 Rob. 332; *The Frederick Molke*, 1 Ib. 86; *The Walsingham Packet*, 2 Ib. 77; *The Hoop*, 1 Ib. 196; *The St. Antonius*, 1 Acton, 113; *The Endraught*, 1 Rob. 22; *The Rindge Jacob*, Ib. 89; *The Jonge Margaretha*, Ib. 189; 4 Rob. 33; 6 Ib. 92, 125.

When the ship is captured, it is the duty of the captors to send her into some convenient port for adjudication.[1] A convenient port is such a port as the ship may ride in, with safety, without unloading her cargo.[2] The master and principal officer and some of the crew of the captured vessel should be sent in for examination. The captors must put on board the captured ship a sufficient prize crew to navigate the vessel into such port, unless the captured crew consent to navigate her. The captured crew are not obliged so to navigate her; but if they consent, they cannot afterwards impute any fault to the captors.[3] The crew of the captured vessel are to be properly treated, and if any wrong is done them the prize court will decree damages to them.[4] The captors have no right to break bulk, or remove any property from the captured vessel, unless in case of necessity, or where obvious reasons of policy or the urgency of the occasion justify them in so doing.[5]

When the prize arrives in port, notice thereof should be given to the federal district judge, or to the standing commissioners for prize proceedings appointed by him, that the examinations of the captured officers and crew who are brought in may be regularly taken in writing, upon oath, in answer to the standing interrogatories. These interrogatories are usually prepared under the direction of the court, and contain searching inquiries upon all points which can affect the question of prize.[6] The prize-master must also deliver up to the federal district judge, forthwith, all the papers and documents found on board, and at the same time make oath that they are delivered up or taken, without fraud, addition, subduction, or embezzlement.[7]

The examination of the officers and crew of the captured vessel must be made as soon as possible after the arrival in port. The examination is ordinarily made by the prize commissioners, and is confined to persons on board at the time of the capture, unless special permission

[1] *The Huldah*, 3 Rob. 235; 5 Rob. 33, 143, 173; *The Lively*, 1 Gallis, 315; *Dinsman* v. *Wilkes*, 12 How. 390; *Fay* v. *Montgomery*, 1 Curtis C. C. R. 260; *Jecker* v. *Montgomery*, 18 How. 110, 122.

[2] *The Washington*, 6 Rob. 275; *The Principe*, Edwards, 70.

[3] *Wilcox* v. *Union Ins. Co.* 2 Binney, 574; *The Resolution*, 6 Rob. 13; *The Pennsylvania*, Acton, 33; *The Alexander*, 1 Gallis 532, S. C. 8 Cranch, 169.

[4] *The San Juan Baptista*, 5 Rob. 33; Ib. 357.

[5] *The Concordia*, 2 Rob. 102; *The Princessa*, Ib. 31; 6 Rob. 220, 275; *Del Col* v. *Arnold*, 3 Dall. 333.

[6] A set of standing interrogatories can be found in the Appendix, p. 81, to 2 Wheaton, R.; also in 1 Rob. 381.

[7] *The Diana*, 2 Gale, 93, 95; *The London Packet*, Ib. 20.

is obtained of the court to examine others.[1] The witnesses are examined apart from each other, and they are not allowed to communicate with or to be instructed by counsel; although they are produced before the commissioners, in the presence of the parties or their agents. The commissioners superintend the regularity of the proceedings, and protect the witnesses from surprise and misrepresentation. When the deposition is taken, each sheet is read over to the witness, and separately signed by him. If a witness refuses to answer at all, or to answer fully, the commissioners certify the fact to the court, and in addition to the other penal consequences to the owners of the ship and cargo from a suppression of evidence, he will be liable to close imprisonment for contempt.

As soon as the examinations are completed, they are to be sealed up and directed to the proper district court, together with all the ship's papers that have not been already lodged by the captors in the registry of the court. It is upon the ship's papers and the depositions thus taken and transmitted, that the cause is in the first instance to be heard and tried.[2] The captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony. Where the justice of the case requires the admission of new evidence, it can be admitted, except where, by the rules of law or the misconduct of the parties, the right to farther proof has been forfeited. But whether such farther proof be necessary or admissible can never be ascertained until the cause has been fully heard upon the facts and the law arising out of the facts already in evidence.

The captors must also, upon the arrival of the captured vessel in port, forthwith proceed to the adjudication of the property captured, by filing a libel and obtaining a monition, citing all persons interested to appear at a given day, and show cause why the property should not be condemned as prize. If they omit, or unreasonably delay thus to proceed, any person claiming an interest in the prize may obtain a monition against them requiring them to proceed to adjudication. If they fail to do this, or do not show sufficient cause for the condemnation of the property, it will be restored to the

[1] *The Eliza and Katy*, 6 Rob. 185; *The Henrick and Maria*, 4 Ib. 43, 57.
[2] *The Vigilantia*, 1 Rob. 1; *The Liverpool Packet*, 1 Gall. 516; *The Ann Green*, Ib. 282.

claimants upon proof of their interest therein. Where the capture is made by a national ship, the libel should be filed by the district attorney, in the name of the United States, and in their behalf, and in behalf of the officers and crew of the capturing ship or ships.[1] The objection that the libel is brought in the name of the captors is merely formal, and cannot be first taken on appeal.[2] All defects of process, such as the want of a monition, or of due notice, are cured by an appearance, duly entered, of a proctor for the claimants.[3]

It is not customary to make any special allegation in the libel of the particular circumstances on which the captors found their title to condemnation. The captors are not called upon to state, at the commencement of the suit, the particular grounds upon which they contend that the captured property is a subject of prize rights. They have a right to institute the inquiry and take the chance of the benefit of any fact that may be produced in the course of that inquiry.[4] They are not confined to the case on which the seizure was made; but may obtain condemnation on a different ground if the facts warrant it.[5]

In the United States the process usually includes a warrant to take possession of the property. The return-day of the monition depends on the discretion of the district judge, but it is generally twenty days at least after the issuing of the process. The monition is usually served by posting a copy on the mast of the prize vessel, and at such other public places as the judge shall direct; and, also, by publication in the newspapers printed in or near the principal place or port of the district into which the prize is brought.

As soon as the captured property is libelled it is deemed to be in the custody of the law. The commissioners of prize are ordinarily charged with the custody of the prize in the first instance, and until further proceedings are had. On an appeal from the district court to the circuit court, the property follows the appeal into the latter court, and is no longer subject to the interlocutory orders of the district court. If the case is carried to the supreme court,

[1] *The Elsebe*, 5 Rob. 173; *Jecker* v. *Montgomery*, 18 How. 110.
[2] *Jecker* v. *Montgomery*, 18 How. 110.
[3] *Penhallow* v. *Doane*, 3 Dall. 54; *Hills* v. *Ross*, Ib. 231.
[4] *The Adeline*, 9 Cranch, 244; *The Fortuna*, 1 Dodson, 81.
[5] *Schacht* v. *Otter*, 33 Eng. L. and Eq. 28.

the property still remains in the custody of the circuit court; for the decrees of the supreme court are remanded to the circuit court for execution.

In cases of delivery on bail, a stipulation according to the course of the admiralty, and not a bond, should be taken. But it is a settled rule of the prize court not to deliver a cargo on bail before the cause has been fully heard, unless by consent of all parties. If any damage should result to a cargo of perishable property from this rule, it may be avoided by an interlocutory sale.[1] After the hearing, if the claimant obtains a decree in his favor, or an order for farther proof, the court will listen to an application for a delivery on bail. Where there is a decree of condemnation the captors are, in general, entitled to a delivery of the property, or the proceeds thereof, upon bail.

Upon the return-day of the process, if no claim has been or is interposed, and if, upon proclamation, no persons appear to interpose, a default is entered of record, and the court proceeds to examine the evidence, and pronounce its decree. But it is not usual to condemn property for want of a claim, till a year and a day have elapsed after the service of the process, except in cases where there is a strong presumption and reasonable evidence to show that the property belongs to an enemy.[2] If no claim is interposed within that period, the property is condemned of course, and the question of former ownership is precluded forever, the owner being deemed in law to have abandoned it.[3] If a claim is interposed, the cause will be heard in its order upon the ship's papers and the preparatory examinations.

Where a claim is interposed it should be made by the owner himself, if within the jurisdiction, and not by his agent; the captors being entitled, in that case, to the several answer, under oath, of each claimant.[4] A person who has a mere lien on the property for a debt due, whether liquidated or unliquidated, is not entitled to assert a claim;[5] and the same rule has been applied to a mortgagee, where the mortgagor has retained possession.[6] More re-

[1] *The Copenhagen*, 3 Rob. 178.
[2] *The Harrison*, 1 Wheat. 298; *The Staat Embden*, 1 Rob. 26, 29.
[3] 1 Rob. 26, 29; 4 Ib. 43; 1 Wheat. 298; *The Avery*, 2 Gallis, 308.
[4] *The Lively*, 1 Gall. 315, 337; *The Sally*, Ib. 401; *The Adeline*, 9 Cranch, 286.
[5] *The Eenroom*, 2 Rob. 1, 5; *The Tobago*, 5 Ib. 218; *The Mariana*, 6 Ib. 24; Ib. 127, 131; *The Frances, Thompson claimant*, 8 Cranch, 335, 418.
[6] *Balch* v. *Darrel*, Bee, 74.

cently it has been held, in England, that the claim must be made by all the owners, equitable as well as legal.[1] Accompanying every claim must be an affidavit, called the test affidavit, which should state that the property, both at the time of the shipment and of the capture, did belong, and will, if restored, belong to the claimant; and if there are any special circumstances in the case, they should be added.[2]

After a claim is put in, it is not amendable, of course. If an amendment is desired to correct the generality of the original claim, it will be allowed if a proper case is made out and sufficient reasons are given for the omission in the first instance, but not otherwise.[3]

If upon the hearing upon the ship's papers and the preparatory examinations, the cause appears doubtful, it is in the discretion of the court to allow or require farther proof, either from the claimants alone, or equally from the claimants and the captors. In some cases it is required by the court for its own relief from doubt; in others, it is allowed to the party to relieve his case from suspicion; and it may be restricted to specific objects of inquiry. It may be made by affidavits and other papers, introduced without any formal allegations, which is the more modern and usual mode, adopted for the sake of convenience, or it may be by way of *plea and proof*, where formal allegations are made by each party in the nature of special pleadings; and each party is at liberty to introduce new evidence to support its allegations and the points put in issue.[4] When farther proof is allowed to the claimants, in the ordinary mode, the captors are not permitted to contradict by affidavits the testimony brought in; counter proof on the part of the captors being admissible only under the special direction of the court.

Farther proof may be ordered by the court itself upon any doubt arising, from any cause or quarter, whether the doubt is caused by the evidence already in, or is produced by extrinsic evidence. But this is rarely done upon the latter ground, unless there is something in the original evidence which suggests further inquiry. When the case is perfectly clear, and not liable to any just suspicion upon

[1] *The Ernst Merck*. 33 Eng. L. and Eq. 594.
[2] *The Adeline*, 9 Cranch, 244. See *The Sally*, 3 Rob. 300, note.
[3] *The Graaf Bernstof*, 3 Rob. 109; *The Sally*, Ib. 179.
[4] *The Ariadne*, 1 Rob. 313; *The Sally*, 1 Gall. 403.

the original evidence, the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon farther inquiry.[1] And where the court orders farther proof in regard to a particular point, and it is furnished by the claimants, the captors will not be permitted to argue for a condemnation on a new ground disclosed by the farther proof; but the court will confine all objections to the points already designated for farther investigation.[2]

The claimant may be admitted to farther proof in cases of reasonable doubt, where his conduct appears fair and is not tainted with illegality, and where the error or deficiency may be referred to honest ignorance or honest mistake.[3] If upon an order for farther proof, the party obtaining it disobeys or neglects to comply with its injunctions, such disobedience or neglect will generally be fatal to his claim.[4] The claimant will not be allowed, upon farther proof, to contradict his own testimony in the preparatory examination as to domicil or national character.[5]

The order for farther proof will be refused to the claimant, where he has been guilty of culpable neglect, or of bad faith, or fraud, or gross misconduct. Thus it is not allowed where fraudulent papers have been used;[6] or where there has been a concealment, or suppression, or spoliation of papers,[7] or where there has been a fraudulent covering or suppression of an enemy's interest;[8] or where the shippers in a hostile ship have neglected to put on board any documentary evidence of the neutral character of the shipment;[9] or where the case appears incapable of fair explanation.[10]

In cases where farther proof is admitted on behalf of

[1] *The Sarah*, 3 Rob. 330; *The Romeo*, 6 Ib. 351; *The Liverpool Packet*, 1 Gall. 525; *The Alexander*, Ib. 532; *The Bothnea and Janstoff*, 2 Ib. 78, 82; *The George*, Ib. 249, 252.

[2] *The Lydiahead*, 2 Acton, 133.

[3] *The Bothnea and Janstoff*, 2 Gall. 82; *The Friendschaft*, 3 Wheat. 14, 48; *The Venus*, 5 Ib. 127; *La Nereyda*, 8 Wheat. 108, 171; *The London Packet*, 1 Mason, 14; *The Welvaart*, 1 Rob. 122; *The Eenroom*, 2 Ib. 1; 2 Rob. 121, 361; 4 Rob. 79, 201.

[4] *La Nereyada*, supra.

[5] *El Telegrafo*, 1 Newb. 383.

[6] *The Welvaart*, 1 Rob. 122; *The Juffrow Anna*, Ib. 124; *The Juffrow Elbrecht*, Ib. 126.

[7] *The Fortuna*, 3 Wheat. 392; *The St. Lawrence*, 8 Cranch, 434; *The Rising Sun*, 2, Rob. 104, 108.

[8] *The Graaf Bernstoff*, 3 Rob. 109; *The Eenroom*, 2 Ib. 15; *The Rosalie and Betty*, Ib. 343, 359; *The Ida*, 29 Eng. L. and Eq. 574; *The Betsey*, 2 Gall. 377; *The Merrimack*, 8 Cranch, 317.

[9] *The Flying Fish*, 2 Gall. 374.

[10] *The Vrow Hermina*, 1 Rob. 163; *The Hazard*, 9 Cranch, 209; *The Pizarro*, 2 Wheat. 227.

the captors, they may introduce papers taken on board of another ship, if they are properly verified by affidavit. And upon the order for farther proof the affidavits of the captors as to facts within their own knowledge, are admissible evidence.[1] They may also invoke papers from another prize cause.[2] But, except under peculiar circumstances, the affidavits of captors are not received in our prize courts.[3]

As to the mode of taking testimony in cases of farther proof, it is to be observed that mere oral testimony is never admitted; but the evidence must be in documents and depositions, taken in the manner already mentioned. In the Supreme Court of the United States it is taken upon commissions alone.[4] Affidavits taken in foreign countries before notaries public, whose attestations are properly verified, are in general proper evidence. It seems, however, to be a general rule of the prize court not to issue any commission to be executed in the enemy's country.[5]

In prize courts there are certain presumptions which legally affect the parties, and are considered as of general application. These relate chiefly to the ownership of the property, the national character of the ship, and the domicil and nationality of the master and claimant. Possession is presumptive evidence of property, and, therefore, justifies the capture of ships and cargoes found in the possession of the enemy, though it may not always be sufficient ground for condemnation.[6] If upon farther proof allowed to a claimant there is still a defect of evidence to show the proprietary interest and the neutral character of the property, it is presumed to belong to an enemy.[7] Goods found in an enemy's ship are presumed to be enemy s property, unless a distinct neutral character and documentary proof accompany them. Where a ship has been captured and carried into an enemy's port, and is afterwards found in possession of a neutral, the presumption is that there has been a regular condemnation, and the proof of the contrary rests on the party claiming the property

[1] *The Romeo*, 6 Rob. 351; *The Resolution*, Ib. 13; *The Maria*, 1 Ib. 340.
[2] *The Romeo*, 6 Rob. 351; 3 Ib. 330; *The Sarah*, 4 Ib. 366; *The Vriendschap*, Ib. 166.
[3] *The Grotius*, 9 Cranch, 368; *The Henrich* and *Maria*, 4 Rob. 57, note *a*; 6 Rob. 54, 58, note *a*.
[4] *The George*, 2 Gall. 249, 252; *The London Packet*, 2 Wheat. 371; Rules of the Sup. Ct. 25, 27.
[5] *The Magnus*, 1 Rob. 31; *The Diana*, 2 Gallis, 97.
[6] *The Resolution*, 2 Dall. 19.
[7] *The Magnus*, 1 Rob. 31.

against the neutral possessor.[1] Ships are presumed to belong to the country under whose flag and pass they navigate.[2] This is held conclusive upon their character against the claimant, but not against others; for these may show that the apparent character of the ship was fictitious and assumed for purposes of deception; or that the transfer under which the apparent ownership is in the enemy, was merely colorable.[3] The produce of an enemy's colony is conclusively presumed to be enemy's property, so far as the question of prize is concerned.[4] Every person is presumed to belong to the country in which he has a domicil, whatever may be the country of his nativity or adoption.[5] But a character acquired by mere domicil, ceases upon removal from the country, and the native character revests as soon as a person puts himself *in itinere*, to return to his native country, *animo revertendi*.[6] In questions of joint capture it is presumed that all public ships of war actually in sight were assisting in the capture, and are therefore entitled to share in the prize; but this presumption may be repelled by proof.[7] This presumption is not admitted in the case of a claim of joint capture by a private vessel.

In prize courts in the United States, no person is incompetent as a witness merely on the ground of interest, but the testimony of every witness is admissible, subject to all exceptions as to its credibility.[8]

In the progress of a cause an unlivery of the cargo sometimes becomes necessary to ascertain its nature and quality, to preserve it from injury, or because the ship and cargo stand upon different grounds. In proper cases, the prize court will, upon proper application, decree an unlivery, and a warrant will issue, usually to the marshal, to unlade the cargo and make a true and perfect inventory thereof; and at the same time, a warrant of appraisement is usually directed to appraisers appointed by the court. As an unlivery of the cargo is considered as done for the benefit of all parties, the expense is generally born by the party ulti-

[1] *The Countess of Lauderdale*, 4 Rob. 283.
[2] *The Vigilantia*, 1 Rob. 1, 15; *The Vrow Anna Catharina*, 5 Ib. 144.
[3] *The Fortuna*, 1 Dods. 87; *The Success*, Ib. 131; *The Ocean Bride*, 33 Eng. L. and Eq. 576; *The Ernst Merck*, Ib. 594.
[4] *The Phœnix*, 5 Rob. 25; *Boyle* v. *Bentzon*, 9 Cranch, 191.
[5] *The Ann Green*, 1 Gallis, 274; *The Venus*, 8 Cranch, 257; *The Harmony*, 2 Rob. 322; *The Indian Chief*, 3 Rob. 23; 5 Ib. 277; 6 Ib. 403.
[6] 3 Rob. 12; *The St. Lawrence*, 1 Gallis, 467.
[7] *The Dordrecht*, 2 Rob. 55; 3 Ib. 194, 311; 5 Ib. 239.
[8] *The Anne*, 3 Wheat. 435, 444; *The Grotius*, 9 Cranch, 368.

mately prevailing.[1] Where the court decrees a sale of the property, it is in the United States invariably made by the marshal; and there should always be an inventory taken and an appraisement made previous to any sale.

The prize court may proceed to make its decree and pronounce a sentence of acquittal or condemnation, as well after as before the death of the parties; for in proceedings *in rem* the suit does not abate by the death or absence of all or any of the parties named in the proceedings.[2] Ordinarily, however, whether the decree be *in rem* or *in personam*, the court will cause the representatives of any deceased party to be notified. Where all the parties are not formally before the court, it acts as a general guardian of all interests which are brought to its notice.

The sentence of condemnation or acquittal is ordinarily by an interlocutory decree. This decree is proper in all cases where anything further is to be done by the court, as in deciding who are captors, or in determining damages in cases of illegal capture. In England, the usual practice has been to acquit or condemn by interlocutory decree in all cases; and a definitive sentence is reserved until all other questions and interests are finally disposed of. In the United States, it is more common to reserve a decree until a final decision of all questions before the court.

If the sentence is of acquittal, it may be with or without damages or costs, or upon the terms of paying costs and expenses. The court may itself ascertain the damages and expenses where they are uncertain, but the more usual practice is to refer the matter to commissioners to hear the parties, and report to the court in detail such allowance as they think legally or equitably due to the parties; and the parties may have a hearing before the court upon the report of the commissioners. When restitution is decreed, if the property is specifically in the custody of the court, a warrant issues for the delivery to the claimant. In such case, unless the court otherwise orders, the expenses of the delivery are to be borne by the captors.[3] If the proceeds of the property are in court, upon application, an order for delivery is made by the court; if they are in the hands of the captors or their agents, a monition, and, if necessary, an attachment, issues to them to bring in the proceeds. Where damages are decreed, the decree is either against

[1] *The Industrie*, 5 Rob. 88.
[2] *Penhallow* v. *Doane*, 3 Dall. 54, 86, 117; *The Falcon*, 6 Rob. 194, 199.
[3] *The Rendsborg*, 6 Rob. 142.

the parties by name, or by a description of their relation to the ship.

If the sentence is of condemnation, a warrant issues to the marshal to sell the prize and return an account into court. When the case is pronounced to be one of condemnation, the next question is to whom it is to be condemned, who are the captors; and this question is to be determined exclusively by the prize court. It is not usual to file claims of joint capture before a decree of condemnation; but if they are not filed before a decree ascertaining who are the captors, and who are entitled to share, and especially before a distribution decreed, it is too late to assert the right. It would seem, therefore, to be the better practice to interpose such claims at an earlier stage of the proceedings, and before any decree of condemnation has passed in any court.

Questions of joint capture are not settled by affidavits. The claim must be brought forward by formal allegations containing a statement of the facts, and if they are such as, if proved, may entitle the parties to share, the court will direct it to be admitted and filed. Thereupon the actual captors are entitled to file counter allegations, and the cause is then to be sustained by documentary proofs, and the depositions of competent witnesses; the *onus probandi* being upon the asserted joint captor.[1]

The testimony of witnesses on board the claiming ship alone, although they release their interest, is not sufficient to establish the fact of joint capture; it must be corroborated by evidence *aliunde*, or the claim will be rejected.[2]

When it has been ascertained who are the captors, the next and final step is to distribute the prize proceeds; which may be done by the court upon its own motion, or upon application of the parties interested. No officer of the court and no person having prize proceeds in his hands, can be safe in distributing them without a decree therefor.[3] Any party interested, his representative or assignee, may maintain a suit in the prize court, to compel the proper parties to come in and account for the proceeds, and make due distribution.[4] If the case is in the appellate court, the

[1] *The Urania*, 5 Rob. 148; *La Virginie*, Ib. 124; 3 Rob. 1. *The Union*, 1 Dods, 346; *The John*, Ib. 363.
[2] *The John*, 1 Dods. 363; *The Fadrelandet*, 5 Rob. 120; Ib. 268.
[3] *Kean* v. *The Brig Gloucester*, 2 Dall. 36; *Penhallow* v. *Doane*, 3 Ib. 54.
[4] *The St. Lawrence*, 2 Gall. 19.

application may be made there by a supplementary petition; or it may be made by a direct original suit *in personam*, brought in the district court.[1]

United States Circuit Court — At Chambers.

Baltimore, Md. June 1, 1861.

BEFORE HON. ROGER B. TANEY, CHIEF JUSTICE OF THE UNITED STATES.

The Merryman habeas corpus — Opinion of Chief Justice Taney.

Ex parte, JOHN MERRYMAN.

The application in this case for a writ of *habeas corpus* is made to me under the 14th section of the judiciary act of 1789, (1789, chapter 20, § 14, 1 Stat. at Large, 81,) which renders effectual for the citizen the constitutional privilege of the writ of *habeas corpus*. That act gives to the courts of the United States, as well as to each justice of the Supreme Court, and to every district judge, power to grant writs of *habeas corpus*, for the purpose of inquiry into the cause of commitment. The petition was presented to me at Washington, under the impression that I would order the prisoner to be brought before me there; but as he was confined in Fort McHenry, at the city of Baltimore, which is in my circuit, I resolved to hear it in the latter city, as obedience to the writ under such circumstances would not withdraw Gen. Cadwalader, who had him in charge, from the limits of his military command.

The petition presents the following case: The petitioner resides in Maryland, in Baltimore county. While peaceably in his own house, with his family, it was at two o'clock, on the morning of the 25th of May, 1861, entered by an armed force, professing to act under military orders. He was then compelled to rise from his bed, taken into custody, and conveyed to Fort McHenry, where he is imprisoned by the commanding officer, without warrant from any lawful authority.

The commander of the fort, Gen. George Cadwalader, by whom he is detained in confinement, in return to the writ, does not deny any of the facts alleged in the petition.

[1] *Bingham* v. *Cabot*, 3 Dall. 19; 2 Dall. 36; *The Pomona*, 1 *Dods.* 25.

He states that the prisoner was arrested by order of Gen. Keim, of Pennsylvania, and conducted as a prisoner to Fort McHenry by his order, and placed in his (General Cadwalader's) custody, to be there detained by him as a prisoner.

A copy of the warrant, or order, under which the prisoner was arrested, was demanded by his counsel, and refused. And it is not alleged in the return that any specific act, constituting an offence against the laws of the United States, has been charged against him upon oath; but he appears to have been arrested upon general charges of treason and rebellion, without proof, and without giving the names of the witnesses, or specifying the acts, which, in the judgment of the military officer, constituted these crimes. And having the prisoner thus in custody, upon these vague and unsupported accusations, he refuses to obey the writ of *habeas corpus* upon the ground that he is duly authorized by the president to suspend it.

The case, then, is simply this. A military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears. Under this order his house is entered in the night; he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement. And when a *habeas corpus* is served on the commanding officer, requiring him to produce the prisoner before a justice of the Supreme Court, in order that he may examine into the legality of the imprisonment, the answer of the officer is, that he is authorized by the president to suspend the writ of *habeas corpus* at his discretion, and, in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.

As the case comes before me, therefore, I understand that the president not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.

No official notice has been given to the courts of justice, or to the public, by proclamation or otherwise, that the president claimed this power, and had exercised it in the manner stated in the return. And I certainly listened to it with some surprise, for I had supposed it to be one of

those points of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended, except by act of congress.

When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson's opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to congress, with all the proofs in his possession, in order that congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject, no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.

Having therefore regarded the question as too plain and too well settled to be open to dispute, if the commanding officer had stated that upon his own responsibility, and in the exercise of his own discretion, he refused obedience to the writ, I should have contented myself with referring to the clause in the constitution, and to the construction it received from every jurist and statesman of that day, when the case of Burr was before them. But being thus officially notified that the privilege of the writ has been suspended under the orders and by the authority of the president, and, believing, as I do, that the president has exercised a power which he does not possess under the constitution, a proper respect for the high office he fills requires me to state plainly and fully the grounds of my opinion, in order to show that I have not ventured to question the legality of his act without a careful and deliberate examination of the whole subject.

The clause in the constitution which authorizes the suspension of the privilege of the writ of *habeas corpus*, is in the ninth section of the first article.

This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. It begins by providing "that all legislative powers therein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives." And after prescribing the manner in which these two branches of the legislative department shall be chosen, it proceeds to enumerate specifi-

cally the legislative powers which it thereby grants, and legislative powers which it expressly prohibits, and at the conclusion of this specification, a clause is inserted giving congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof."

The power of legislation granted by this latter clause is by its words carefully confined to the specific objects before enumerated. But as this limitation was unavoidably somewhat indefinite, it was deemed necessary to guard more effectually certain great cardinal principles essential to the liberty of the citizen, and to the rights and equality of the states, by denying to congress, in express terms, any power of legislating over them. It was apprehended, it seems, that such legislation might be attempted, under the pretext that it was necessary and proper to carry into execution the powers granted, and it was determined that there should be no room to doubt, where rights of such vital importance were concerned, and, accordingly, this clause was immediately followed by an enumeration of certain subjects to which the powers of legislation shall not extend; and the great importance which the framers of the constitution attached to the privilege of the writ of *habeas corpus* to protect the liberty of the citizen, is proved by the fact that its suspension, except in cases of invasion and rebellion, is first in the list of prohibited powers; and even in these cases, the power is denied, and its exercise prohibited, unless the public safety may require it. It is true that in the cases mentioned congress is, of necessity, the judge of whether the public safety does or does not require it; and its judgment is conclusive. But the introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the government of the United States such power over the liberty of a citizen.

It is the second article of the constitution that provides for the organization of the executive department, and enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed was intended to be conferred on the president, it

would undoubtedly be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.

The article begins by declaring that the executive power shall be vested in a president of the United States of America, to hold his office during the term of four years; and then proceeds to prescribe the mode of election, and to specify in precise and plain words the powers delegated to him and the duties imposed upon him. And the short term for which he is elected, and the narrow limits to which he is confined, show the jealousy and apprehensions of future danger which the framers of the constitution felt in relation to that department of the government, and how carefully they withheld from it many of the powers belonging to the executive branch of the English government which were considered as dangerous to the liberty of the subject, and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the government.

He is elected, as I have already said, for the brief term of four years, and is made personally responsible, by impeachment, for malfeasance in office. He is, from necessity and the nature of his duties, the commander-in-chief of the army and navy, and of the militia, when called into actual service. But no appropriation for the support of the army can be made by congress for a longer term than two years, so that it is in the power of the succeeding house of representatives to withhold the appropriation for its support, and thus disband it, if in their judgment the president used or designed to use it for improper purposes. And although the militia, when in actual service, are under his command, yet the appointment of the officers is reserved to the states as a security against the use of the military power for purposes dangerous to the liberties of the people or the rights of the states.

So, too, his powers in relation to the civil duties and authority necessarily conferred on him are carefully restricted, as well as those belonging to his military character. He cannot appoint the ordinary officers of government, nor make a treaty with a foreign nation or Indian tribe, without the advice and consent of the senate, and cannot appoint even inferior officers unless he is authorized

by an act of congress to do so. He is not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person shall "be deprived of life, liberty, or property, without due process of law,"— that is, judicial process. And even if the privilege of the writ of *habeas corpus* was suspended by act of congress, and a party not subject to the rules and articles of war was afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one referred to, that is, the sixth article, provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

And the only power, therefore, which the president possesses, where the "life, liberty, or property" of a private citizen is concerned, is the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution as they are expounded and adjudged by the co-ordinate branch of the government, to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by force too strong to be overcome without the assistance of the executive arm. But, in exercising this power, he acts in subordination to judicial authority, assisting it to execute its process, and enforce its judgments.

With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any

emergency, or in any state of things, can authorize the suspension of the privilege of the writ of *habeas corpus*, or arrest a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws if he takes upon himself legislative power by suspending the writ of *habeas corpus*, and the judicial power also, by arresting and imprisoning a person without due process of law. Nor can any argument be drawn from the nature of sovereignty, or the necessities of government for self-defence in times of tumult and danger. The government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the constitution, and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted; for the tenth article of the amendments to the constitution, in express terms, provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Indeed, the security against imprisonment by executive authority, provided for in the fifth article of the amendments of the constitution, which I have before quoted, is nothing more than a copy of a like provision in the English constitution, which had been firmly established before the declaration of independence.

Blackstone, in his commentaries (1st vol. 137), states in the following words:—

"To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison." And the people of the United States, who had themselves lived under its protection while they were British subjects, were well aware of the necessity of this safeguard for their personal liberty. And no one can believe that in framing a government intended to guard still more efficiently the rights and the liberties of the citizens against executive encroachment and oppression, they would have conferred on the president a power which the history of England proved to be dangerous and oppressive in the hands of the crown, and which the people had compelled it to surrender after a long and obstinate struggle on the part of the English executive to usurp and retain it.

The right of the subject to the benefit of the writ of *ha-*

beas corpus, it must be recollected, was one of the great points in controversy during the long struggle in England between arbitrary government and free institutions, and must therefore have strongly attracted the attention of statesmen engaged in framing a new, and, as they supposed, a freer government than the one which they had thrown off by the revolution. For from the earliest history of the common law, if a person was imprisoned, no matter by what authority, he had a right to the writ of *habeas corpus* to bring his case before the King's Bench; and if no specific offence was charged against him in the warrant of commitment, he was entitled to be forthwith discharged; and if an offence was charged which was bailable in its character, the court was bound to set him at liberty on bail. And the most exciting contests between the crown and the people of England from the time of Magna Charta were in relation to the privilege of this writ, and they continued until the passage of the statute of 31st Charles II., commonly known as the great *habeas corpus* act. This statute put an end to the struggle, and finally and firmly secured the liberty of the subject from the usurpation and oppression of the executive branch of the government. It nevertheless conferred no new right upon the subject, but only secured a right already existing. For although the right could not justly be denied, there was given no effectual remedy against its violation. Until the statute of the 13th of William III., the judges held their offices at the pleasure of the king, and the influence which he exercised over timid, time-serving, and partisan judges, often induced them, upon some pretext or other, to refuse to discharge the party although he was entitled to it by law, or delayed their decisions from time to time, so as to prolong the imprisonment of persons who were obnoxious to the king for their political opinions, or had incurred his resentment in any other way.

The great and inestimable value of the *habeas corpus* act of the 31st Charles II. is, that it contains provisions which compel courts and judges, and all parties concerned, to perform their duties promptly, in the manner specified in the statute.

A passage in Blackstone's commentaries, showing the ancient state of the law upon this subject, and the abuses which were practised through the power and influence of the crown, and a short extract from Hallam's Constitutional

History, stating the circumstances which gave rise to the passage of this statute, explain briefly, but fully, all that is material to this subject.

Blackstone, in his commentaries on the laws of England (3d vol. 133, 134), says:—

"To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible.

"But the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a *habeas corpus* may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner.

"And yet, early in the reign of Charles I., the Court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood), determined that they would not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. This drew on a parliamentary inquiry, and produced the Petition of Right (3 Chas. I.), which recites this illegal judgment, and enacts that no freeman shall hereafter be imprisoned or detained. But when, in the following year, Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of 'notable contempts, and stirring up sedition against the king and the government,' the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they, however, annexed a condition of finding securities for their good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that 'if they were again remanded for that cause, perhaps the court would not afterward grant a *habeas corpus*, being already made acquainted with the cause of the imprisonment.' But this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of the matter, whose resentment was not cooled at the distance of four-and-twenty years."

It is worthy of remark that the offences charged against the prisoner in this case, and relied on as a justification for his arrest and imprisonment, in their nature and character, and in the loose and vague manner in which they are stated, bear a striking resemblance to those assigned in the warrant for the arrest of Mr. Selden. And yet, even at that day, the warrant was regarded as such a flagrant violation of the rights of the subject, that the delay of the time-serving judges to set him at liberty upon the *habeas corpus* issued in his behalf, excited the universal indignation of the bar. The extract from Hallam's Constitutional History, vol. 4, p. 14, is equally impressive and equally in point.

"It is a very common mistake, not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any right upon the subject. From the earliest records of the English law, no freeman could be detained in prison, except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the Court of King's Bench a writ of *habeas corpus ad subjiciendum* directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided for in the Magna Charta (if indeed it were not more ancient), that the statute of Charles II. was enacted, but to cut off the abuses by which the government's lust of power, and the servile subtlety of crown lawyers, had impaired so fundamental a privilege."

While the value set upon this writ in England has been so great that the removal of the abuses which embarrassed its enjoyment has been looked upon as almost a new grant of liberty to the subject, it is not to be wondered at that the continuance of the writ thus made effective should have been the object of the most jealous care. Accordingly, no

power in England short of that of parliament can suspend or authorize the suspension of the writ of *habeas corpus*. I quote again from Blackstone (1 Comm., 136): "But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great as to render this measure expedient. It is the parliament only, or legislative power, that, whenever it sees proper, can authorize the crown to suspend the *habeas corpus* for a short and limited time, to imprison suspected persons without giving any reasons for so doing." And if the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to intrust to the crown, a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First.

But I am not left to form my judgment upon this great question, from analogies between the English government and our own, or the commentaries of English jurists, or the decisions of English courts, although upon this subject they are entitled to the highest respect, and are justly regarded and received as authoritative by our courts of justice. To guide me to a right conclusion, I have the commentaries on the constitution of the United States of the late Mr. Justice Story, not only one of the most eminent jurists of the age, but for a long time one of the brightest ornaments of the Supreme Court of the United States, and also the clear and authoritative decision of that court itself, given more than half a century since, and conclusively establishing the principles I have above stated.

Mr. Justice Story, speaking in his commentaries of the *habeas corpus* clause in the constitution, says:—

"It is obvious, that cases of a peculiar emergency may arise, which may justify, nay, even require, the temporary suspension of any right to the writ. But as it has frequently happened in foreign countries, and even in England, that the writ has, upon various pretexts and occasions, been suspended, whereby persons apprehended upon suspicion have suffered a long imprisonment, sometimes from design, and sometimes because they were forgotten, the right to suspend it is expressly confined to cases of rebellion or invasion,

where the public safety may require it. A very just and wholesome restraint, which cuts down at a blow a fruitful means of oppression, capable of being abused in bad times to the worst of purposes. Hitherto no suspension of the writ has ever been authorized by congress since the establishment of the constitution. It would seem, as the power is given to congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency had arisen must exclusively belong to that body." 3 Story's Com. on the Constitution, section 1836.

And Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *ex parte* Bollman and Swartwout, uses this decisive language in 4 Cranch, 95:

"It may be worthy of remark that this act (speaking of the one under which I am proceeding,) was passed by the first congress of the United States sitting under a constitution which had declared 'that the privilege of the writ of *habeas corpus* should not be suspended unless when, in cases of rebellion or invasion, the public safety might require it.' Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they gave to all the courts the power of awarding writs of *habeas corpus*."

And again, in page 101:

"If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. The question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, the court can only see its duty, and obey the laws."

I can add nothing to these clear and emphatic words of my great predecessor.

But the documents before me show that the military authority in this case has gone far beyond the mere suspension of the privilege of the writ of *habeas corpus*. It has by force of arms thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted military government in its place, to be administered

and executed by military officers. For at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district-attorney, and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. Up to that time there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States in Maryland, except by the military authority. And if a military officer or any other person had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it to the district attorney, and it would then have become the duty of that officer to bring the matter before the district judge or commissioner; and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the party, would have held him to bail, or committed him for trial, according to the character of the offence as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. There was no danger of any obstruction, or resistance, to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. And yet, under these circumstances, a military officer, stationed in Pennsylvania, without giving any information to the district attorney, and without any application to the judicial authorities, assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if, indeed, he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without having a hearing even before himself, to close custody in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that "no person shall be deprived of life, liberty, or property, without due process of law." It declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly de-

scribing the place to be searched, and the persons or things to be seized." It provides that the party accused shall be entitled to a speedy trial in a court of justice.

And these great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers may thus, upon any pretext, or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found.

In such a case my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer on me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions and exceeded the authority intended to be given him. I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the District of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to "take care that the laws be faithfully executed," to determine what measures he will take to cause the civil process of the United States to be respected and enforced.

United States District Court. For the Eastern District of Pennsylvania.

THE UNITED STATES *v.* CHARLES A. GREINER.

Shortly before the late revolutionary secession of Georgia, a volunteer military company in her service, by order of her governor, took possession of a fort within her limits, over which jurisdiction had been ceded by her to the United States, and garrisoned it until her ordinance of secession was promulgated, when, without having encountered any hostile resistance, they left it in the possession of her government. A member of this com-

pany, who had participated in the capture and detention of the fort, afterwards visited Pennsylvania at a period of threatened, if not actual, hostilities between the confederated States, of which Georgia is one, and the United States. He was arrested in Pennsylvania under a charge of treason.

It was held that if the courts of the United States for Georgia had been open, or if there had been a reasonable probability that they would soon be able to exercise their jurisdiction, the accused should, upon the charge of treason, have been committed, under the 33d section of the judiciary act of 24th September, 1789, to stand his trial in the Circuit Court of the United States for the Southern District of Georgia, which court alone could have jurisdiction of the case. This act of congress would then have required that a warrant should be seasonably issued for his removal to that district by the marshal. Such a warrant of removal was not asked for on behalf of the United States; and it was admitted that their courts for Georgia were not open, and were not likely to be able to exercise their jurisdiction within any definable period. Under such circumstances, the constitution and laws of the United States gave no authority to commit the accused, or to require him to give bail to answer the charge of treason at an uncertain future day in Georgia.

But though his immediate purpose in visiting Pennsylvania was apparently neither belligerent nor treasonable, the motive of his visit was, on account of his prior hostile relations to the United States, liable to just suspicion. He was required, therefore, to give security to keep the peace, and be of good behavior in all cases arising under the constitution and laws of the United States.

When a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of this purpose, is an overt act of treason in levying war.

Their occupation of a fortress, in order to take it from the dominion of a government to which they owe allegiance, is treason in every one of them concerned in the capture or subsequent detention of the post, though they may encounter no hostile resistance in the capture or the detention.

A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act on the ground of compulsion, unless he was forced, under a personal fear of death, into the service and quitted it as soon as he could.

This doctrine applies wherever, and so long as, the duty of allegiance to an existing government remains unimpaired. Though a revolution is impending, the allegiance continues to be due, so long, at least, as the courts of justice of the government are open to maintain its peace, and afford the citizen that protection which is the foundation of his duty of allegiance.

The accused owed a twofold allegiance, to the United States, and to the state of Georgia. His duty of allegiance to the United States was coextensive with the jurisdiction of their government, and was, to this extent, independent of, and paramount to, his duty of allegiance to the State. It continued to be thus paramount so long, at least, as the courts of the United States could exercise their jurisdiction within the state. Though these courts have been closed since the capture of the fort, there was, at its date, no such conflicting enforced allegiance to the state as made him a public enemy of the United States, in contradistinction to a traitor.

The provision of the constitution, that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or

on confession in open court, is inapplicable to preliminary hearings and commitments.

Charles A. Greiner was brought under a charge of treason, before a commissioner of the United States. At the suggestion of the commissioner, the examination, on account of the importance of the case, was taken before the district judge of the United States. At the close of the examination, the United States district attorney, George A. Coffey, Esq., moved that the defendant be committed or held for trial at the next actual session of the United States Circuit Court for the Southern District of Georgia. The district attorney admitted that the United States courts did not now sit, nor their process actually run, in Georgia; but he argued at length that the judge was bound to presume that those courts would sit in Georgia within a reasonable period; and that this was at present a legal presumption, in view of the avowed purpose of the government to re-establish its authority there.

After hearing the evidence, the learned district judge delivered the following opinion:—

CADWALADER, J. — The questions in this case are more important than difficult. On the 2d of January last, an artillery company of the state of Georgia, mustered in military array, took Fort Pulaski, in that state, from the possession of the United States, without encountering any forcible resistance. They garrisoned the post for some time, and left it in the possession of the government of the state. The accused, a native of Philadelphia, where he has many connections, resides in Georgia. He was a member of this artillery company when it occupied the fort, and, for aught that appears, may still be one of its members. He was not its commander. Whether he had any rank in it, or was only a private soldier, does not appear, and is, I think, unimportant. He is charged with treason in levying war against the United States. The overt act alleged is that he participated, as one of this military company, in the capture of the fort, and in its detention until it was handed over to the permanent occupation of the authorities of the state.

The primary question is whether, if his guilt has been sufficiently proved, I can commit him for trial, detain him in custody, or hold him to bail to answer the charge. The objection to my doing so is, that the offence was committed in the state of Georgia, where a court of the United States

cannot, at present, be held, and where, as the district attorney admits, a *speedy* trial cannot be had. The truth of this admission is of public notoriety.

The constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a *speedy* trial by a jury of the *state and district* wherein the crime shall have been committed. The only statute which, if the courts of the United States for the State of Georgia were open, would authorize me to do more than hold this party to security of the peace and for good behavior, is the 33d section of the judiciary act of the 24th September, 1789. (Act 1789, chapter 20, § 33, 1 Stat. at Large, 91.) That section, after authorizing commitments, etc., for trial before any court of the United States having "cognizance of the offence," enacts that if the commitment is "in a district other than that in which the offence is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had." The district attorney of the United States does not ask me to issue such a warrant for this party's removal to Georgia for trial. Therefore I can do nothing under this act of congress. It does not authorize me to detain him in custody to abide the ultimate result of possible future hostilities in Georgia, or to hold him to bail for trial in a court there, of which the sessions have been interrupted, and are indefinitely postponed.

The next question is, whether I should, under the act of 16th July, 1798, (act 1798, chapter 83, 1 Stat. at Large, 609,) require this party to give security to keep the peace and be of good behavior in all cases arising under the constitution and laws of the United States. His counsel suggests that he was acting under the compulsion of military orders from the governor of Georgia, which the law of the state bound him to obey; that the fort, when taken, was not so garrisoned or occupied that an array of military force was required for its capture; that it was taken without actual resistance on the part of the person or persons who had occupied it for the United States; that the period was one at which motives of hostility against the United States are not imputable to the governor of

Georgia, or to those who acted under his orders; that the capture and subsequent detention of the fort may have been to prevent its riotous occupation or destruction by a mob; and that the accused party therefore was not guilty of levying war against the United States, or of any other offence against their laws. If these views are incorrect, if either the capture or the detention of the post was treasonable, there can, I think, be no dispute that security of the peace and for good behavior should be required.

In explanation of Mr. Greiner's visit to Philadelphia, it has been shown that his wife and child have been here from the commencement of last winter, at a boarding-house, at which he arrived a few days ago, and that he has lived there openly, with them, from that time until his arrest on Tuesday last. The district attorney states that he has made sufficient inquiry, and asks no time for further inquiry, into the circumstances of this visit, or as to occurrences during Mr. Greiner's sojourn here. He appears, nevertheless, to have declared his intention to return to Georgia, where he is engaged, as he states, in agricultural pursuits. However favorably this case may thus, in one aspect of it, have been presented, there is a different aspect in which it ought also to be considered. The crisis is one of impending or threatened, if not of actual hostilities, in which different sections of the country are, or may soon be, arrayed in arms against each other. Mitigating circumstances, which might induce the pardon of an act of treason, cannot so qualify the offence as to alter its legal definition. That a person who has participated in a treasonable aggression upon a fortress of the United States, should, at such a period as this, pass and repass the frontier of the seceded states without being justly liable to the most vigilant suspicion, cannot be supposed possible. The reasons are obvious. Should he, for example, transmit intelligence to Georgia concerning military preparations here, or take part, however indirectly, in procuring supplies or other assistance for those in arms against the United States, he would commit an act of treason for which he would be triable here. Those who stand in his relation to two hostile sections of a country are, unfortunately, the persons most frequently concerned in such criminal enterprises. In their punishment, public policy may sometimes require a severity sadly disproportionate to the actual measure of guilt in their intentions. I

have, therefore, during the two days of the hearing, considered carefully the question whether it would be my duty, if the courts of the United States for Georgia were open, to commit him under the charge of treason, and issue a warrant for his removal thither for trial. If this question is answered affirmatively, he should not be discharged without giving cautionary security under the act of 1798. I have heard his counsel fully upon this point. But I have declined hearing the district attorney upon it, because I have no doubt whatever that sufficient probable cause to support a prosecution for treason has been shown.

Any such aggravated breach of the *duty of allegiance* to an *existing* government as may tend to its total or partial subversion is, in a general sense, within the political definition of treason. Under the government of the United States, the legal catalogue of specific offences embraced in this definition is, however, limited by the constitutional provision that "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." Under other governments, including that of England, the catalogue of treasons is more extended. But the two species of treason mentioned in the constitution are described in it in language borrowed from that of the English statute of treasons. The phrase "levying war," as used in the constitution, is therefore understood and applied in the United States in the same sense in which it had been used in England. Chief Justice Marshall consulted Coke, and Hale, and Foster, in order to ascertain the constitutional meaning of this phrase, 2 Burr's Tr. 402, 409; 4 Cranch, 471, 472, 477. According to these writers, the occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, either in the occupation or in the detention of the post.

The words of Sir E. Coke are, "If any, with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king," 3 Inst. 10. Sir M. Hale has copied this language almost precisely. 1 Pl. Cor. 146. Sir M. Foster says, "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as, sup-

pose, by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason. But, if this be done in confederacy with enemies or rebels, that circumstance will make it treason, in the one case under the clause of adhering to the king's enemies, in the other, under that of levying war," Disc. 1, ch. II., 11. In the year 1776, the powers of government under the British East India Company were vested, at Fort St. George, in the president and council of Madras. Neither the president nor the council could rightfully administer the local government independently of one another. The president adopted certain arbitrary and illegal measures for suspending a majority of the council from participation in its proceedings. They, in turn, assuming the administration of the government, deposed and imprisoned him, and took and detained possession of the fort. As their intent, in this usurpation of power, was only to substitute themselves for the regular local government, and exercise its functions in subordination to the East India Company, they were convicted of a misdemeanor only. But the Court of King's Bench were of opinion that "if the assumption of the government, and taking possession of the fort, had been with an intent to *draw it from the dominion of* the crown of Great Britain, it would have been high treason," 21 St. Tr. 1283; see 3 C. Rob. 31.

The present case is much more simple. In the fort in question there was, in legal strictness, no more division of power, or deduction from the jurisdiction of the United States, than there is in the District of Columbia, 6 Wheaton, 426, 427; 12 Peters, 619. The jurisdiction of the United States was, under the constitution, as exclusive and independent of state control as if the land on which the fort was erected, and which had been ceded by the state of Georgia, had not been within her limits. If indeed the purpose of taking possession of it, as a defenceless post, had been to keep it for the United States, the act, whether excusable or not, would not have been treasonable. But the crisis was one of impending revolution or insurrection. The threat of revolutionary measures had already proceeded from the government of the state. The detention of this post for her government by this hostile force was, therefore, I think, levying war against the United States. If the treasonable intent had at first been legally doubtful,

the subsequent unqualified surrender of the fortress to the state would, if the doubt were not removed by it, render the case a proper one, at all events, for the consideration of a jury.

That no hostile resistance was opposed by the former occupants of the fort, is, I think, unimportant. When a body, large or small, of armed men, is mustered in military array for a treasonable purpose, every step which any one of them takes in part execution of this purpose, is an overt act of levying war. This is true, though not a warlike blow may have been struck. The marching of such a corps with such a purpose, in the direction in which such a blow might be struck, is levying war upon land. The mere cruising of an armed vessel with a hostile purpose, is levying maritime war, though the cruiser may not encounter a single vessel. This doctrine, which is conceded throughout the opinion of Chief Justice Marshall in Burr's case, had been established previously by English authorities, 1 Hale P. C. 152; Foster, 218; 2 Salk, 635; 13 How. St. Tr. 485; 2 Burr's Tr. 408; 4 Cranch, 476.

The allegation that the accused was, or may have been, acting under the orders of the governor of Georgia, or of some other commanding or superior officer, is likewise unimportant. In the cases of the Highlanders of Scotland, whose clans were, without any independent will of their own, mustered by their chiefs into the military service of Charles Edward, when he invaded England in 1745, the legal character of such a defence was fully considered. The previous doctrine then recognized, and re-established, was that the fear of having houses burned, or goods spoiled, was no excuse, in the eye of the law, for joining and marching with rebels; that the only force which excuses on the ground of compulsion, is force upon the person and present fear of death, which force and fear must continue during all the time of military service with the rebels, and that it is incumbent in such a case on every man who makes force his defence, to show an *actual* force, and that he quitted the service as soon as he could, Foster 14; 18 St. Tr. 391, and see Foster Disc. 1, ch. 2, s. 8. If any other excuse were allowable, it would, in the language of Sir M. Foster, "be in the power of any leader in a rebellion to indemnify all his followers."

This doctrine is applicable wherever and so long as the

duty of allegiance to an existing government remains unimpaired. When this fort was captured, the accused, in the language of the Supreme Court, owed "allegiance to two sovereigns," the United States and the State of Georgia; see 14 How. 20. The duty of allegiance to the United States was coextensive with the constitutional jurisdiction of their government, and was, to this extent, independent of, and paramount to, any duty of allegiance to the state, 6 Wheaton, 381, and 21 Howard, 517. His duty of allegiance to the United States continued to be thus paramount so long at least as their government was able to maintain its peace through its own courts of justice in Georgia, and thus extend, there, to the citizen that protection which affords him security in his allegiance, and is the foundation of his duty of allegiance. Though the subsequent occurrences which have closed these courts in Georgia may have rendered the continuance of such protection within her limits impossible at this time, we know that a different state of things existed at the time of the hostile occupation of the fort. The revolutionary secession of the state, though threatened, had not then been consummated. This party's duty of allegiance to the United States, therefore, could not then be affected by any conflicting enforced allegiance to the state. He could not then, as a citizen of Georgia, pretend to be a public enemy of the United States in any sense of the word "enemy," which distinguishes its legal meaning from that of traitor. Future cases may, perhaps, require the definition of more precise distinctions, and possible differences, under this head. The present case is, in my opinion, one of no difficulty, so far as the question of probable cause for the prosecution is concerned.

The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The constitution provides that no person shall be *convicted* of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and, upon the trial of an indictment, would not in connection with the testimony of the single witness to the overt act, suffice to warrant a conviction. But the provision of the constitution and the language of the first section of the act of April 30, 1790, (1790, ch. 9, § 1, 1 Stat.

at Large, 112,) on the subject, apply only to the trial of indictments, and are inapplicable to proceedings before grand-juries, or to preliminary investigations like the present.

This appears to have been the opinion of Chief Justice Marshall, 1 Burr's Tr. 196; and likewise of my judicial predecessor in this district, 2 Wall, Jr. 138. Judge Iredell had, indeed, been previously of a different opinion, 1 Whart. St. Tr. 480. His impression had probably been derived from the opinions which, under the statutes 1 Ed. 6 c. 12, s. 22, 5 Ed. 6, c. 11, s. 11 and 7 W. 3, c. 3, had prevailed in England. *See Fenwick's case,* 13 St. Tr. 537, and 26 How. 731. As the point has never been directly decided in the United States, it may not be amiss to mention a difference between the language of the English statutes and the words of the constitution. Those statutes enacted that no person should be *indicted* or convicted of treason, unless, etc. The constitution, omitting the word "indicted," uses the single word "convicted." This difference in language, to which the attention of Chief Justice Marshall was doubtless directed, though he does not mention it, seems to be decisive of the question. The intention of the framers of the constitution must have been to restrain the application of the prescribed rule of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial.

In the present case I require security of the peace and for good behavior.

The above opinion having been read, the district attorney made a formal application to the effect of a suggestion which he had made in his previous argument. The suggestion had been that, although the accused party could not be sent at this time to Georgia for trial, he might be committed here for trial in the proper court of the United States for Georgia, when it should hereafter be open, and that he might, in the mean time, be detained here in custody, or admitted to bail to answer the charge hereafter in Georgia. The formal application was a motion that he be held to bail, or committed for trial, "at the next *actual* term or session of the Circuit Court of the United States for the Southern District of Georgia. After the argument of this motion, the judge retained his former opinion, saying:—

I cannot commit this party for trial under any other jurisdiction than that conferred by the 33d section of the act of 1789. Under this act I can commit him to no other custody than that of the marshal. I cannot, under the act, commit him to the marshal's custody for any purpose other than that of removal to Georgia. If it appeared probable that the proper court there would be open within a definite reasonable period, the necessity of the case might authorize a limited corresponding delay, either in the issuing or the executing of a warrant of removal; perhaps in executing it, rather than in issuing it. But no such probability appears. Most of the cases which have been cited as to putting off trials for criminal offences, and keeping prisoners under arrest, are precedents to regulate the practice of courts to which the prisoners are committed for trial, and not the practice of magistrates ordering the removal of prisoners to proper places for trial. The judiciary system of the United States is founded upon the constitution. The warrant of the removal must be issued *seasonably* under the judiciary act, with a view to a probable *speedy* trial under the constitution, in the proper district. The district attorney still declares that he does not wish that a warrant of removal be issued. The order of commitment, as he asks it, without such a warrant, would be a dangerous precedent. It would sanction the imprisonment, for indefinitely long periods, of persons at great distances from their homes and their friends, where bail might not be found. Under charges for capital offences bail might be refused as well at the time of commitment as also afterwards on *habeas corpus*.

Though I have no doubt myself upon the point, yet as my refusal of the application will not be liable to revision, I am desirous of consulting on the subject with Judge Grier, who, I am confident, will, at my request, sit with me, and hear the district attorney's arguments repeated.

Judge Grier, after having heard these arguments, remarked that his opinion coincided on all the points of the case, and particularly the point upon which it had been asked, with the district judge's opinion, which he had previously read.

The district judge then said: The decision upon this

hearing, though Judge Grier kindly sits with me, must be exclusively my own. His concurrence in my former opinion, to which I adhere, confirms me in a satisfactory belief of its correctness. The district attorney's motion is not granted.

Mr. Greiner, upon entering with two sureties into a recognizance in $10,000 to keep the peace and be of good behavior in all cases arising under the constitution and laws of the United States, was discharged from custody.

Supreme Court of Pennsylvania.

WILLIAMSON *v.* LEWIS.

Persons restrained of liberty on any bailable criminal charge, are, on showing this fact, entitled to a *habeas corpus* under the provisions of the *habeas corpus* act of 18th February, 1785, issued by a court or a single judge thereof, in order that they may be admitted to bail to appear and be tried in due course, or that they may be discharged if no sufficient cause of detention appear; and they may have redress for breaches of this right, by means of the penalties prescribed in the act.

Persons restrained of their liberty by private force or authority, under any pretence whatsoever, have the same right to the writ under the *habeas corpus* act, in order that they may have proper relief, and the same redress for breaches of this right.

The act does not require a court or a single judge to issue a *habeas corpus* where the party is detained on a criminal charge, not bailable, or on civil process, or any judgment, decree, sentence, or conviction, including convictions for contempt; though even in these cases the common law allows the writ out of the proper court.

All cases of *habeas corpus*, other than those provided for in the *habeas corpus* act, are merely common-law forms of the remedy, and are to be granted and enforced according to the common law, and not under the provisions and penalties of the act.

A single judge of a state court is not liable to the penalty of the statute for refusing to issue a *habeas corpus* in favor of one who stands committed by a federal court for a contempt; because the statute does not require its issue in such a case.

This was an action of debt, brought by Passmore Williamson against Ellis Lewis, late a judge of the Supreme Court of this state, to recover the penalty of three hundred pounds given by the 13th section of the act of 18th February, 1785, for refusing to grant him a writ of *habeas corpus*.

The declaration was in debt. It stated, in substance, that the plaintiff, on the 31st day of July, 1855, in vacation time and out of term, stood committed to the custody of

the marshal of the eastern district of Pennsylvania, and was detained in the jail of the city and county of Philadelphia under a warrant of commitment, issued by the Hon. John K. Kane, judge of the District Court of the United States for the Eastern District of Pennsylvania, as for a contempt in refusing to make return to a certain writ of *habeas corpus* theretofore issued, against the said plaintiff, out of the said District Court of the United States, at the instance of one John H. Wheeler; and being so committed and detained, the plaintiff did complain to the said defendant, being a judge of the Supreme Court as aforesaid, praying the said defendant to award a writ of *habeas corpus* according to the provisions of said act of assembly, so that the said plaintiff might be brought before the said defendant, to do, submit to, and receive what the laws might require; and that the said defendant, not regarding the duties of his office, refused to award the said writ of *habeas corpus*, contrary to the act of assembly aforesaid, whereby the said defendant forfeited the sum of three hundred pounds, and an action had accrued to the said Passmore Williamson, being the party aggrieved, to demand and have from the said defendant the said sum of money; and that although often requested so to do, the plaintiff had not paid the said sum of money, but had refused so to do, to the damage, etc.

The defendant pleaded the general issue.

The case came on to be tried on the 14th December, 1858, before his honor, Chief Justice Lowrie, who, on motion of defendant's counsel, directed a nonsuit, to which direction the plaintiff excepted, and asked a certificate to the court in banc, and assigned the direction of the court as error.

Opinion of the court by

Lowrie, C. J.—The plaintiff was committed to prison by the District Court of the United States, for a contempt of court, in refusing to answer to a writ of *habeas corpus*. And thereupon he applied to the defendant, then chief justice of this court, for a writ of *habeas corpus*, and his petition was refused. The plaintiff regards this as an injury to him, and therefore he brings this suit for the penalty prescribed by the act of assembly against any judge who shall refuse to issue a *habeas corpus*, as "required by the act." He was nonsuited below. Is this

error? In other words, does the act require a judge to issue a *habeas corpus* in such a case?

We have already decided, not only that the act does not require it of a single judge, but that even this court has not, and cannot have, any authority to issue such a writ in such a case, 2 Casey, 9. We have shown this by reference to the English practice, and especially to the opinions of such eminent English judges as De Gray, 3 Wils. 198; Blackstone, Ibid. 204; Wilde, 5 C. B. 418, and others; 14 Q. B. 554; and of such eminent American judges as Story, 7 Wheat. 42; Kent, 4 Johns. 368–73; 5 Id. 288; Gibson, 1 Watts, 68; and we now add Taney, 21 Howard, U. S. Rep. 523. If, then, this court has no authority to issue the writ when such a case as this is presented to them, it seems too plain for argument, that no single judge of the court could do it, and the law has not been violated.

It is argued that the district court had no jurisdiction of the case in which the alleged contempt was committed. But that is not the question, and cannot be a question under the *habeas corpus* act. That act, so far as it relates to criminal matters, requires a writ founded on the warrant of commitment alone; and all that the judge applied to is required to look at is the warrant. If that shows a cause of commitment that is "bailable," and for which he may take the recognizance of the party to appear and be tried, he is bound to grant the writ; otherwise, he is not; and of this he must judge at the peril of the penalty. The act gives him no authority, and especially it does not require him to look back of the warrant to the record on which it is founded; and therefore it imposes no penalty for not doing what possibly he might have done had he inquired beyond the warrant. If the district court usurped authority in taking cognizance of the case out of which the contempt arose, this plaintiff has other remedies; but the *habeas corpus* act imposes no penalty upon a judge for refusing to inquire and decide that question. The penalty of the act is for refusing to grant this writ in order to admit to bail to appear and answer, where the warrant shows a commitment for a bailable offence.

Whatever we may say about the offence charged in the warrant, certainly it is not bailable, and therefore not provided for by this act, and no single judge had any authority to interfere by *habeas corpus* with the warrant. This is the

most obvious and satisfactory ground of the decision in *Yates* v. *Lansing*, 5 Johns. 288; 9 Id. 421–3, where it was decided that, where the chancellor had committed one for a contempt, and a judge of the Supreme Court had discharged him on *habeas corpus*, a recommitment by the chancellor did not subject him to the penalty which the statute imposes for recommitment. It was not a recommitment contrary to the statute, because the *habeas corpus*, and the discharge under it, were not authorized by the statute, and were therefore void.

Any one who will take the pains to analyze the *habeas corpus* act, will readily discover that it includes all cases of detention on a bailable criminal charge, or on any other color or pretence, that is, in any other manner than by civil or criminal process, that is, by any private force or authority. And so the statutory writ has always been administered.

It was not needed in the case of civil process, because all such detention is by judicial process, mesne or final, and is in the due course of law, and subject to correction by other adequate remedies, proceedings in perfect accordance with official harmony and subordination. The statutory writ would be quite disorderly if applied here.

It was not needed in capital or non-bailable offences, because its common-law form was quite as adequate for this as was consistent with public safety and order.

It was needed for bailable criminal cases, because it was due to the person charged that he should not be unreasonably imprisoned, and that he should be promptly admitted to bail, and thus secured a regular trial by due course of law, before the tribunals appointed to try him.

It was needed in cases of private restraints of liberty, because these are not in the due course of law, and the citizen or subject is entitled to a speedy hearing before a judge, that it may be decided whether the restraint of his liberty is rightful or not.

For these two classes of cases only does the statute provide; for public restraints on bailable criminal charges, and for private restraints on any pretence whatsoever.

Yet the common-law efficacy of the *habeas corpus* goes far beyond this; and the writ takes many forms, according to the character of the case to which it is applied. We shall refer to only two of these forms. Much perplexity has

arisen in many minds from confounding these with each other, and with the statutory writ, and therefore it is important to distinguish them.

The *habeas corpus cum causa* and the *habeas corpus ad subjiciendum* are both common-law writs, and both of them were in past times of very great importance to the rights of persons; but in modern times both of them have lost much of their importance by the gradual substitution of other more convenient forms that have taken their place, as well as by a clearer and firmer recognition of the principles which they were intended to enforce. Both are in fact writs *cum causa*, and yet they are quite different in their application.

The one usually called *habeas corpus cum causa* was a writ issuing out of a superior court to an inferior one, and directed to the judges of the latter to remove causes pending before them to be tried in the superior courts. And in old times it was regarded as a most important writ for the security of the subjects, because it secured to them a trial before the most learned and impartial courts, free from the tyranny of personal and local excitements, prejudices, and dislikes, and from the judicial ignorance of inferior tribunals. Its province was at first very indefinite, and hence it was often very abusively applied, to the great injury of private rights, and so as to produce disorder in the administration of justice; and therefore many statutes were passed to restrain its application. Blackstone gives us an adequate, but not a full account of this, 3 Com. 130.

This form of the writ is seldom used by us now, because it is seldom needed. It is a form of enforcing an undoubted authority over subordinate courts. But some of its principles have passed into, or naturally belong to, the administration of the common-law *habeas corpus ad subjiciendum;* because superior courts, in reviewing the commitments of inferior magistrates on this latter writ do, sometimes, go back of the commitment, and inquire into the grounds of it and their sufficiency. The power to do this comes from the fact of their superiority, and therefore from common law, and not from the *habeas corpus* act. They cannot, of course, do so in relation to commitments by courts that are not their inferiors in the judicial hierarchy; and therefore the superior common-law courts never deal so with each others' commitments, or with those of the Court

of Chancery. A judge could have no right to issue it so as to violate the due course of law secured by Magna Charta, and with us, by our American constitutions; 14 Johns. 368; 3 Wils. 198; 5 Com. B. 418; 14 Q. B. 554.

Of course, our state courts cannot thus interfere with the acts of the federal courts, without violating the due course of law, for they belong to a totally different judicial hierarchy or order. And this does not say that any court may wickedly usurp power with impunity, but only that there shall be no disorderly correction of such usurpations. There are regular remedies for it by action and impeachment, and if these are not sufficient the proper authorities ought to provide others. The *habeas corpus* act provides none. When a court has authority to send a *habeas corpus* or a *certiorari* to remove a cause and the record of it from an inferior court, to be tried before them, or when they act as superior committing magistrates, they may go back into the evidence on which the commitment is founded, and review that, because of their jurisdiction over the inferior courts and their acts, and because of their general superiority. Where they have no such superiority, they cannot do it. No one will pretend that any state judge or court has this sort of superiority over the federal courts.

So great was the efficiency of the common-law writ (*cum causa* and *ad subjiciendum*), that Mr. Hallam, in his constitutional history of England, vol. 3, p. 16, thinks we are apt to greatly over-estimate the value of the *habeas corpus* act, because it was merely affirmative of well-settled common-law principles of right declared in Magna Charta, and often repeated in subsequent statutes. If this be true of the English statute, it is much more so of ours, because these principles had been very often declared with us from the very start of the province, and had become much more definitely understood and admitted when our act was passed than they were at the date of the English statutes.

But this view of Mr. Hallam rests on the very common mistake of considering declarations of principles and rights as equivalent to settled institutions; whereas, the real force that is to act upon or resist other forces is in the institution which the principles have produced; as the force of an animal or a tree is in the animal or tree itself, and not in the vital force that produced it. As a matter of fact, the

arisen in many minds from confounding these with each other, and with the statutory writ, and therefore it is important to distinguish them.

The *habeas corpus cum causa* and the *habeas corpus ad subjiciendum* are both common-law writs, and both of them were in past times of very great importance to the rights of persons; but in modern times both of them have lost much of their importance by the gradual substitution of other more convenient forms that have taken their place, as well as by a clearer and firmer recognition of the principles which they were intended to enforce. Both are in fact writs *cum causa*, and yet they are quite different in their application.

The one usually called *habeas corpus cum causa* was a writ issuing out of a superior court to an inferior one, and directed to the judges of the latter to remove causes pending before them to be tried in the superior courts. And in old times it was regarded as a most important writ for the security of the subjects, because it secured to them a trial before the most learned and impartial courts, free from the tyranny of personal and local excitements, prejudices, and dislikes, and from the judicial ignorance of inferior tribunals. Its province was at first very indefinite, and hence it was often very abusively applied, to the great injury of private rights, and so as to produce disorder in the administration of justice; and therefore many statutes were passed to restrain its application. Blackstone gives us an adequate, but not a full account of this, 3 Com. 130.

This form of the writ is seldom used by us now, because it is seldom needed. It is a form of enforcing an undoubted authority over subordinate courts. But some of its principles have passed into, or naturally belong to, the administration of the common-law *habeas corpus ad subjiciendum;* because superior courts, in reviewing the commitments of inferior magistrates on this latter writ do, sometimes, go back of the commitment, and inquire into the grounds of it and their sufficiency. The power to do this comes from the fact of their superiority, and therefore from common law, and not from the *habeas corpus* act. They cannot, of course, do so in relation to commitments by courts that are not their inferiors in the judicial hierarchy; and therefore the superior common-law courts never deal so with each others' commitments, or with those of the Court

of Chancery. A judge could have no right to issue it so as to violate the due course of law secured by Magna Charta, and with us, by our American constitutions; 14 Johns. 368; 3 Wils. 198; 5 Com. B. 418; 14 Q. B. 554.

Of course, our state courts cannot thus interfere with the acts of the federal courts, without violating the due course of law, for they belong to a totally different judicial hierarchy or order. And this does not say that any court may wickedly usurp power with impunity, but only that there shall be no disorderly correction of such usurpations. There are regular remedies for it by action and impeachment, and if these are not sufficient the proper authorities ought to provide others. The *habeas corpus* act provides none. When a court has authority to send a *habeas corpus* or a *certiorari* to remove a cause and the record of it from an inferior court, to be tried before them, or when they act as superior committing magistrates, they may go back into the evidence on which the commitment is founded, and review that, because of their jurisdiction over the inferior courts and their acts, and because of their general superiority. Where they have no such superiority, they cannot do it. No one will pretend that any state judge or court has this sort of superiority over the federal courts.

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habeas corpus act was greatly needed at the time of its passage (1679), when the friends of liberty, and leaders of the people, were continually in danger of imprisonment at the pleasure of the king, and by his order or that of his privy council or some member of it. The principle was, indeed, as old in its expression, as Magna Charta, that justice, by due course of law, should be denied to no man; but it lacked the body and force which is imparted only by a firm institution.

Sir Edward Coke, 2 Inst. 186, in treating of commitments by command of the king, spoken of in St. Westm. 1, c. 15, passed in 1275, says this meant by the king "in some court of justice, according to law." But this is a plain anachronism. He is speaking of his theory of his country's institutions (which was itself in advance of his times), in explanation of the institutions actually existing three and a half centuries before, when every lord had a castle with a prison in it, and every king might commit when he pleased, according as he himself chose to regard Magna Charta. There was no institution strong enough in itself to protect private rights against the all-embracing and all-powerful institution which was embodied in him.

The fact is plain; the principle needed an institution that was itself firm enough to give it body and force. The courts were not such institutions, for they were mere ministers of the king, appointed during his pleasure, and acting on the received theory of government, that the king was the source of all authority. Both sentiment and logic, therefore, guided them to the conclusion that they could assume no authority contrary to his will. To perform judicial functions well, the courts had to become a real power in the land, based on a firm foundation of its own, and not a mere ministry to other powers.

It was necessary, therefore, that the *habeas corpus* should itself become, as it were, an institution, by taking a firm and definite form, that could not be mistaken, and by being armed with penalties which no judge could resist, and no king could set aside. Thus, too, the courts themselves became more powerful against royal influence. When the law at last required that they should be commissioned during good behavior, they had little need of the *habeas corpus* act to secure them against royal interference; but it was still useful to insure their attention to the demands of suit-

ors. Our respect for the writ of *habeas corpus* depends much more upon the good it has done, than upon its modern efficacy; for, in recent times, it has been in very many cases superseded by other forms of process. Its unobtrusive value in quiet times is seldom thought of, and it works so smoothly that it is scarcely felt. By this and other processes, the ordinary excitements and irregular modes of dealing of private life are easily managed by the courts, when they know how to make proper allowances for the ordinary imperfections of humanity. And, even when judicial questions become the subject of great popular excitement, the difficulty is not so much in the case, as in the presentation of the decision of it in such a way as not to add to the excitement, and endanger the very stability of our most sacred institutions.

Let us now notice the common-law *habeas corpus ad subjiciendum*. It has a much broader scope than that form of it which is secured by the *habeas corpus* act; for it may issue in all sorts of cases where it is shown to the court that there is probable cause for believing that a person is restrained of his liberty unlawfully or against the due course of law. The statutory remedy falls far short of this, and we fall into inevitable confusion when we go into the common-law province of the writ for the principles that are to rule within its statutory province.

Again, this form of the writ by statute, and at common law, is addressed to the person detaining another, and not to the judges under whose order, judgment, or warrant he is detained, commanding him to produce the body, and the cause of his detention. Of course the jailer, keeper, or detainer could show no other cause (except in case of detention by private force) than the warrant of commitment; and the court could have nothing else to decide upon, unless, by reason of their official superiority, they could go back of the warrant, as we have already indicated. When this official superiority exists, they may go back of the warrant, and ought to do so in proper cases. Here, however, the warrant shows a conviction for a proper cause, a contempt of court, and therefore a case not bailable to answer, and therefore a case not within the *habeas corpus* act. And it is not within the common law of *habeas corpus*, because a judge of a state court, or the court itself, has no such superiority over a federal court as would justify him or it in

reviewing the conviction. And a federal court has no such superiority over any state court, except to remove causes for trial into a federal court, where a removal is authorized by act of congress.

The fact that the petitioner annexes to his petition both the warrant (which the law requires) and the record on which it is founded (which the law does not require) does not affect the case. The judge, the defendant, could not look at the record, because he had no authority to call for it by *certiorari* or otherwise, and because he could treat nothing as the record except what he had authority to call for as record, and what should be certified to him by the court below as such, and because he had no authority to review the acts of any tribunal that is not his official subordinate. No matter how wrong, and how clearly wrong the district court may have been in deciding as it did, the state judge could not review his decision by *habeas corpus* without an abuse of the process, and a plain usurpation of power. We need not say that he could or could not have discharged from a warrant void on its face, for this warrant is plainly not so. He could not on the *habeas corpus*, and according to the act, admit the prisoner to bail, because the warrant showed a conviction, and therefore not a bailable case.

Judgment affirmed.

Supreme Judicial Court of Massachusetts.

January Term, 1861. *Middlesex.*

STEPHEN COOLIDGE *v.* CHARLES BRIGHAM.

The validity of the appointment of one who holds a commission as justice of the peace, and has taken the oaths of office, cannot be inquired into in the superior court on a motion to dismiss an action which was originally made returnable before him.

Contract, commenced by a writ dated April 4, 1859, signed and issued by William Barnes of Marlborough in the county of Middlesex, as justice of the peace for said county, and made returnable before him April 16, 1859. The parties appeared on the return day, and, after a trial, judgment was rendered for the plaintiff, and the defendant appealed to the superior court.

In the superior court the defendant moved that the action

be dismissed, for the reason "that said Barnes in point of fact was not at the time said action was commenced, or since, a justice of the peace, duly appointed, commissioned and qualified to try civil cases in said county." It appeared at the hearing upon this motion, that another person by the name of William Barnes, residing in Marlborough, had been for several years a justice of the peace, and so continued up to the time of his death, in 1856; that, in conformity to custom, and in ignorance of the fact of his death, a new commission in his name was made out and signed, in anticipation of the expiration of his former commission, and was sent by mail addressed to "William Barnes, Esq., Marlborough, Mass."; that the governor and council did not know of the existence of such a person as the William Barnes who signed the writ in the present action, and intended simply to renew the commission of the former magistrate; and that the last-named William Barnes received the commission, so addressed, from the post-office in Marlborough, and went with it before the governor of the commonwealth, who was not acquainted with him, and took the oaths of office.

It further appeared that the last-named William Barnes was more than twenty-one years of age at the time of receiving the commission from the post-office; that, since the decease of the former William Barnes, he has been the only person of that name living in Marlborough; and that, since taking the oaths of office, he has performed the ordinary duties of a justice of the peace for that county.

Upon this evidence, *Morton*, J. dismissed the action, on the ground that William Barnes, who signed the original writ, was not duly nominated and confirmed as a justice of the peace. The plaintiff alleged exceptions.

G. A. Somerby, for the defendant.

No counsel appeared for the plaintiff.

Bigelow, C. J. The court had no authority to entertain the motion to dismiss this action on the ground relied upon by the defendant; and the admission of evidence in support of the motion, and the order dismissing the action, were clearly erroneous.

The magistrate before whom the action was originally brought was an officer *de facto*. He was not a mere usurper, undertaking to exercise the duties of an office to which he had no color of title. He had an apparent right to the

office. He had a commission under the great seal of the State, bearing the signature of the governor, with his certificate thereon that the oaths of office had been duly administered, and in all respects appearing to have been issued with the formalities required by the constitution and laws of the commonwealth. He was thus invested with the apparent muniments of full title to the office. Although he might not have been an officer *de jure*, that is, legally appointed and entitled to hold and enjoy the office by a right which could not, on due proceedings being had, be impeached or invalidated, he was nevertheless in possession, under a commission *prima facie* regular and legal, and performing the functions of the office under a color and show of right. This made him a justice of the peace *de facto*.

No rule of law is more firmly established than that which gives to the acts of such an officer the same efficacy and validity, so far as they affect third parties, as to those done by an officer *de jure*. His title or claim to the office cannot be tried in a proceeding to which he is not a party; nor can his authority to exercise its functions be called in question in a collateral proceeding. The reasons for this rule are obvious. It rests upon considerations of public policy, and the necessity of affording protection to those whose rights and interests may be affected by the official acts of persons exercising the authority and performing the duties of a public office, under an apparent title to its possession and enjoyment. It would create great difficulty and embarrassment, and lead to irremediable confusion and mischief, if, in every case where an official act is essential to give validity to the rights of third persons, it could be invalidated and set aside by proof of some informality or defect in the appointment or election of the officer who performed it. Nor is this the worst consequence which would follow. No one would be safe in the execution of process issued by inferior courts or magistrates, if their justification in serving precepts, legal on their face and coming from persons clothed with an apparent authority to act, could be set aside and defeated by showing that the title of a judge or magistrate to the office which he claimed to exercise was defective and invalid. If such was the rule of law, innocent persons might be made to suffer for acting under an authority which they felt bound to obey, and of the invalidity of which they were wholly ignorant. *The King* v. *Lisle*,

Andrews 163; S. C. 2 Stra. 1090; *Knight* v. *Corporation of Wells*, 1 Lut. 508; *The King* v. *Corporation of Bedford Level*, 5 East. 366; *Margate Pier* v. *Hannan*, 3 B. & Ald. 266; *People* v. *Collins*, 7 Johns. 549; *Plymouth* v. *Painter*, 17 Conn. 585; *Monson* v. *Hunt*, Ib. 566; *McGregor* v. *Balch*, 14 Verm. 428. If this action had been against the magistrate, and he had attempted to justify his acts under and by virtue of his commission as a justice of the peace, it might have been competent to show that his appointment was invalid and afforded him no protection; but, with this sole exception, the only proper mode of trying the question of the validity of an appointment or election to a public office, which a person claims to exercise under a color or show of right, is by a *quo warranto*, or other proper process to which the officer is a party, and in which the title may be definitely and conclusively settled. *Fowler* v. *Bebee*, 9 Mass. 231; *Commonwealth* v. *Fowler*, 10 Mass. 290; *Strong, Petitioner*, 20 Pick. 484; *Sudbury* v. *Stearns*, 21 Pick. 148, 155. But it is not competent for any court, in a proceeding entirely collateral in its nature, to adjudge an election or commission void, and on that ground to vacate and annul official proceedings on which the rights of third parties depend.

Exceptions sustained.

Supreme Judicial Court of New Hampshire. December Term, 1860.

Hillsborough.

DIVOLL *v.* ATWOOD.

Usury — Pleading — Res judicata.

Where the defendant pleaded usury, and prayed a deduction of three times the amount in the mode prescribed by the statute, and upon denial of all usury by the plaintiff upon oath, judgment was rendered against the defendant —

Held, that this finding was conclusive upon the fact of usury, and that it was not open to the defendant to prove it, upon the general issue, to show want of consideration to the extent of the unlawful interest.

FRANCESTOWN *v.* DEERING.

Settlement of paupers — Resulting trust.

A settlement by residence, ownership for four years of real estate of the value of $150.00, and payment of all taxes, is not affected by showing such taxes to have been illegally assessed.

When real estate is conveyed to the wife, no trust arises to the husband from payments made after the time of the purchase.

BREED *v.* GORE.

Incompetency of wife as witness for or against her husband.

Assumpsit to recover of defendant balance for necessaries furnished the wife of defendant, while living separate from her husband. Upon the hearing before the auditor, the plaintiff offered the wife of the defendant, as a witness against him.

The auditor excluded her.

Held, That the ruling of the auditor was correct. She was not admissible by virtue of our statutes, or at common law.

CUDWORTH *v.* SCOTT.

Personal mortgage — Growing crops.

TRESPASS, for taking and carrying away plaintiff's hay, grain, and straw, the product of the farm of one Keyes, during the year 1859.

The rye and rye-straw were from the sowing of the fall of 1858.

In January, 1859, Keyes, for a good consideration, by his mortgage deed, in due form conveyed to plaintiff "all the hay and grain of every kind that grows on the farm on which I now live, the present year." The defendant, as a deputy sheriff, attached said property, on the 20th of October, 1859, while in the barn of said Keyes, and sold the same on a writ in favor of a creditor of Keyes.

Held, That plaintiff was entitled, under his deed, to hold the value of the winter rye and hay, as being in *esse*, at the time of the execution of his chattel mortgage, but no part of the grain crop of the spring of 1859.

DIVOLL *v.* ATWOOD.

Mortgage — Usury — Pleading — Res judicata.

In a writ of entry on a mortgage, the defendant may reduce the amount of the conditional judgment by a deduction of three times the unlawful interest reserved or taken.

His plea in such case may be, with a general verification with a view to an issue as at common law, or with a special verification under the statute, in which case the oath of the defendant must be tendered.

A replication to such plea setting out a suit upon the notes secured by the same mortgage, a plea of usury under the statute, a denial of the usury by the plaintiff, verified by his oath, and a judgment against the defendant upon the plea is good, as showing the matter to be *res judicata*, but without an allegation of such judgment the plea is bad.

Merrimack.

STATE (HERRICK, RELATOR) *v.* RICHARDSON.

Parent and child — Custody of minor children.

A father is entitled to the custody of his minor children; and in the case of a child ten years of age, the court, on *habeas corpus*, will ordinarily award the custody to him, unless it be made to appear that he is clearly unfit for the trust, or has, by some legal act, parted with his parental rights.

Nor will the action of the court be controlled by the wishes of a child of such tender years.

RICHARDSON ET AL. *v.* CHICKERING ET AL.

Boundaries — Estoppel — Trespass, quare clausum.

The controversy between the parties related to the true location of lot No. 20, in Hooksett.

Settled, That the monuments, or boundaries marked, or made on the ground originally, or such as had been recognized by the owners or parties in interest, for the last twenty years or more, would prevail over the description of the original laying out, or the courses and distances therein expressed.

That the plaintiffs were estopped from denying the line between lots No. 20 and 19, up to which they had sold and conveyed land, and which they had before pointed out as the true line to defendants, and which they induced them to purchase and hold to.

LUND *v.* LUND, ADMR.

Administrator — Intent — Funeral expenses — Gravestones — Account.

Where an administrator, after his appointment, proceeds in good faith to collect the debts due to the estate, although the money may be well invested and drawing interest, he will not, for that reason merely, be charged with interest upon the same, if he does not without cause keep the money unemployed, when it is his duty to pay it over, or receive interest thereon or use the same in his own business.

An administrator will not be allowed, on the settlement of his account, for money paid out, for car or coach fare for himself and wife, or for a sister and her husband to attend the funeral of a brother, nor will the administrator be allowed pay for his time or services in attending such funerals.

Our statute only authorizes administrators or executors to procure gravestones or monuments, where the estate is actually solvent; and when this is the case, he should be allowed only for plain and substantial gravestones at a reasonable cost.

Fifteen to thirty dollars, according to circumstances, is a reasonable sum to allow for gravestones where the estate upon settlement does not exceed $3,000, and should not exceed the latter sum in any such case.

If the administrator is desirous of expending a large sum for a monument in such an estate, he should first procure the consent of the heirs at law.

In presenting an administration account, it is no objection that the administrator has omitted to enter the items of interest and commissions. And these items and amounts may properly be added by the judge of probate after adjusting the balances, and considering the other circumstances of the case.

LOCKE *v.* SMITH.

Infancy — Voidable contracts — Repudiation.

If a minor be emancipated at fourteen, and he afterwards agree to pay for necessaries, which he had received before he was fourteen, and which had been furnished him on his father's account and for which he was not liable, such contract is voidable on the ground of infancy.

An infant may bind himself to pay for necessaries he obtains, so much as they are reasonably worth, but not what he may foolishly have agreed to pay for them.

When a contract with an infant is executed, and the consideration has passed on both sides, he cannot, on coming of age, repudiate his contract without returning the consideration he has received; or, where that cannot be done, he must place the other party in as good a position as though he had returned it, before he can recover back the consideration that has passed from him.

PEMBROKE *v.* ALLENSTOWN.

Settlement of a pauper — Highway taxes — Payment — Proof.

On a question of settlement depending upon the payment of taxes, entries upon the lists committed to the surveyor of highways made in the usual course of business, and verified by him upon the stand, he having now no memory of the particular facts stated, may be read in evidence. And where no entry is made by him against the tax in question, but the surveyor testifies that the paper contains a record of all that was paid, it is competent evidence to be weighed by the jury.

PERRY *v.* CARR.

Equity Pleadings — Tender.

A bill in equity must state a case upon which, if admitted by the answer, a decree can be made.

Therefore a bill to redeem from a sale upon execution of a right of redemption, which contains no averment of readiness to pay and an offer to pay, is bad, on demurrer for want of equity.

Rockingham.

HAYES *v.* TABOR.

Uses and trusts — Estate of cestui que trust — Remainders — Estoppel.

If land is devised to A. and his heirs forever, upon the uses, trusts, and conditions that A. should permit Mary and John to use, occupy, and enjoy the same during their lives and the life of the survivor, and, after the death of both Mary and John, that one half of the same shall be to the use of Harriet forever, and the other half to the use

of Lydia for life; and after the death of Lydia to the use of Lydia's children forever —

This devise conveys to A. no estate in trust, but an estate to a use merely.

The equitable estate devised to Harriet and the children of Lydia, should it ever vest in them, would descend to their heirs.

The several *cestui que uses* have thus an equitable estate of equal duration with the legal estate devised to A.

A. would take no estate by this devise because the statute of uses, in force in this state, would execute the use, so that the legal estate, as well as the equitable, would vest in the *cestui que use.*

The remainder to Lydia during the life of John (Mary being dead) is only contingent.

The remainder to Lydia's children during the life of John and Lydia was doubly contingent.

Lydia's children (Lydia being dead) can have only a contingent remainder, and no estate of inheritance vests in them during the life of John.

Deeds from Lydia's children of the land in John's lifetime convey no title to the premises.

But such of her children as are of age, and have conveyed with warranty, will be estopped from claiming the land.

While those who, being minors, have conveyed by guardian, would not be thus estopped, but might claim and hold their estate, should it ever become vested, against the deeds of their guardians.

SIMPSON ET AL. *v.* HARVEY AND TRUSTEE.

Assignment — Trustee process.

An assignment to a third person in trust for all the creditors, passes the legal title to the trustee, and a foreign attachment will take effect only upon the surplus in the hands of the trustee, after discharging the debts of those creditors who became parties to the assignment before service of the process.

An assignment of "all the property and effects" of the assignor is valid, without a more particular description, to convey all his estate, both real and personal; and a provision that a schedule of the principal part of the property shall be made and annexed, is to be regarded as a matter

of convenience simply, and not as necessarily preceding the taking effect of the assignment.

Nor is the validity of the assignment affected by the fact, that the surviving partner assigns only the effects of the firm and his own, he having no power to assign the effects of the deceased partner.

EDMONDS *v.* GRIFFIN ET AL.

Deposition — Writ of entry — Demandant's possession — Color of title.

An objection to a magistrate taking a deposition, must be regarded as waived unless made at the caption, provided the objection was known to the party or his counsel.

When a person having a quitclaim deed of a tract of land from one who held it by deed of warranty, made entry upon it, and then conveyed it to the demandant, — *Held*, that the latter had such seisin as would enable him to maintain a writ of entry against a wrongdoer.

As the demandant offered no evidence of title beyond possession, it was competent for the defendants to show that the conveyances under which the plaintiff claimed, did not include the land in dispute, and that the entry made by his grantor upon the land in dispute was not under claim of title.

Strafford.

WOOD ET AL. *v.* FOLSOM.

Amendment — New counts.

Where the original counts are for money paid, &c., and money had and received, a new count for work and labor as defendant's factor and agent, will not be received by way of amendment, without defendant's assent, it being wholly inconsistent with the original claim.

FURBER *v.* CAVERLY.

Indorsee — Waiver of demand and notice — Assumpsit.

Plaintiff, as indorsee, claimed to recover of defendant, as indorser, the amount of two promissory notes. Both notes were indorsed to plaintiff, for a good consideration, before they became due, by the defendant, on the back of each, as follows: —

"ALFRED CAVERLY."
"ACCOUNTABLE."

There was no demand on the signers, who failed to pay the notes, and no notice to the indorsee.

Held, That under this form of indorsement, plaintiff was not bound to show a *demand* and *notice*, as defendant had waived them.

CITY OF DOVER *v.* TWOMBLY ET AL.

Liquor agent — Tenure of office — Bond — Sureties.

The office of agent for the purchase and sale of spirituous liquors is an annual office, and the official bond covers the official year only,— although the agent may, by reappointment or holding over, continue in office longer.

STATE *v.* PLACE.

Jurisdiction of justices of the peace.

An appeal from the judgment of a justice of a police court. The complaint was for an assault, with an intent to commit a rape. The justice proceeded to try the respondent, and found him guilty of an assault only, and fined him. Respondent appealed from this judgment.

Held, That the justice had no final jurisdiction of the complaint. That he could investigate the case so far as to ascertain whether the offence charged had been committed, then to discharge, or to recognize the respondent, with proper sureties, to the next trial-term of this court.

Proceedings adjudged irregular, and quashed.

Sullivan.

SARAH S. SMART *v.* AMOS BLANCHARD.

Libel — Evidence — Variance.

In an action for a libel upon the plaintiff in connection with a "*donation*" party which she had attended, the character of that party and the conduct of its members cannot be proved by the defendant under the general issue.

The mere opinions of witnesses as to the meaning of the libel, or that it was of and concerning the plaintiff, are not admissible.

But where the words are ambiguous, and the application doubtful, it must be shown that they were used in their actionable sense, and were applied to the plaintiff, and that the hearers so understood them,— and therefore the testi-

mony of the hearers as to how they understood the words is admissible.

If a portion of the article claimed to be libellous is omitted in the declaration, but the substance of the charge remains the same, it is no variance.

A publication in a newspaper, if false, is actionable though the editor believed it to be true, and acted in good faith, and the law will imply malice.

REED, ADM'R *v.* SPAULDING.

Gifts inter vivos and causa mortis — Competency of witness — Impeachment — Declarations.

Gifts *inter vivos*, like those *causa mortis*, must be perfected by actual delivery.

But gifts *inter vivos*, when perfected by actual delivery and acceptance, unlike those *causa mortis*, go into immediate and absolute effect.

When a suit is brought by an administrator for the benefit of a residuary legatee, and a third person gives a bond to the administrator to indemnify him against the costs of the suit, such third person is in no sense a party to the suit, but is a competent witness.

But when the court had erroneously ruled that the plaintiff's witness could not testify unless the plaintiff (the administrator) should elect to do so, and the plaintiff excepts to that ruling, and thereupon elects to testify himself and does so testify, he thereby removes the ground of the exception he had taken.

Upon the question of the genuineness of the testator's signature to a paper offered in evidence by the defendant, and it appeared that on one occasion a witness had seen the defendant copy the testator's name from a genuine signature, it was held incompetent to inquire of the witness as to the correctness of that imitation where the copy has not been preserved, with the view of showing that the defendant might have written the signature in question, especially as the witness was not an expert.

Where a witness has been impeached by showing that he had made statements to several persons contradictory to those made on the stand, it is not competent to introduce the statements of the witness made to other persons similar to those made upon the stand, for the purpose of sustaining

him, even when such statements were made immediately after the transaction occurred, which has been stated upon the stand, unless it shall distinctly appear that there has been some change in the relation of the witness to the party or cause since such early statements were made.

BACKMAN *v.* CHARLESTOWN.

Town agents — Purchase and sale of liquors — Authority — Limitation.

The power of selectmen of towns to make rules to govern the agent appointed by them, extends to the purchase as well as the sale of spirituous liquors, and under that power they may prohibit his use of the town's credit altogether.

If, however, these rules are wilfully made so stringent as to defeat the object of the law, the selectmen would subject themselves to indictment in the same way as if they refused to appoint an agent at all.

Where the appointment of such agent contains a prohibition of the use of the town's credit, and is duly recorded in the town records, as required by law, every person who sells liquor to him is deemed to be charged with notice of such limitation, and can maintain no action against the town for the price of the liquors.

If, as in this case, the time of the making of the records be not shown, yet as the law requires the appointment to be in writing, the seller is put upon inquiry as to the nature and extent of the agent's authority, and is to be charged with notice of all that reasonable inquiry would have given him.

If, however, the goods had been purchased by the agent, assuming the right to pledge the town's credit for the price, and the town had afterwards received them with a knowledge of the way they were purchased, and applied them to its use, this would have been a ratification of the agent's authority, and the town would be bound.

RECENT ENGLISH CASES.

Court of Exchequer.

SEYMOUR *v.* GREENWOOD.

Master and servant — Responsibility of master for act of servant — Ejecting passenger from omnibus.

An omnibus conductor dragged a drunken passenger out of the omnibus with unnecessary violence, and threw him down in the middle of the street. A vehicle passing at the same moment injured the passenger. *Held*, that the proprietor of the omnibus was responsible.

This was an action to recover damages for a personal hurt sustained by the plaintiff by reason of the negligence of the servant of the defendant. It appeared at the trial before Blackburn, J., at the last Liverpool Summer Assizes, that the defendant was a proprietor of omnibuses and cabs in Liverpool. The plaintiff was a traveller by one of his omnibuses, and being drunk and obnoxious to the other passengers, the conductor of the omnibus required him to get out; he refused to do so; the conductor thereupon seized hold of him and dragged him out very roughly, and flung him on the ground, and left him there; and a cab driving up at the same moment, he was, without any want of care on the part of the cab-driver, injured by that vehicle. The cab in question happened to belong to the defendant; but no weight was attached to that circumstance. It was objected at the trial that upon the facts the conductor was a trespasser, and that his master could not be made responsible for that which was a wilful assault by him. The learned judge overruled the objection, and left the question to the jury, who found a verdict for the plaintiff with £5 damages. A rule was subsequently obtained pursuant to leave reserved to enter a nonsuit.

Monk, Q. C. and *Wheeler*, showed cause. The verdict was properly entered for the plaintiff. The servant was acting in discharge of his duty as conductor in ejecting the plaintiff, and having been guilty of carelessness and violence in the execution of that duty, his employer is responsible, on the general principle that a master is responsible for the negligence of a servant while acting in his service. There was no malice on the part of the conductor, nor any wilful intent to injure.

T. Jones, in support of the rule. The act was a trespass on the part of the conductor. The assault committed on the plaintiff is not one for which the conductor's employer should be held responsible, because the plaintiff at the time was a passenger. Suppose he had authority to expel from the vehicle a person obnoxious to the other passengers, there was no authority in so doing to commit an assault; and the defendant, although he would be liable for an unjustifiable expulsion, cannot be held responsible for the excess of violence of his servant, in expelling a passenger under circumstances which render the expulsion itself justifiable. He cited *McManus* v. *Crickett*, 1 East. 106; *Savignac* v. *Roome*, 6 T. R. 125; *Roe* v. *Birkenhead Railway Co.* 7 Exch. 36.

POLLOCK, C. B. — I am of opinion that this rule ought to be discharged. The principle by which this question is governed is laid down in *Roe* v. *Birkenhead Railway Co.*, a case which, so far as I am aware, has never been overruled. The conductor was justified in obeying the lawful command of his master in removing a drunken man from the vehicle; but not in doing it with brutality. It was his want of care in executing the command of his master, the defendant, which produced the mischief. The evidence showed that the servant was executing the command of his master with a want of that care and consideration which he was bound to exercise, particularly in a case of this description. The state of the law upon this subject has been very much expanded since the case of *Scott* v. *Shepherd*, 2 Bl. 892, and of *McManus* v. *Crickett*. Any one who reads these cases cannot fail to see that the principle was not then so considered as to work out all the legal considerations attending it. Public safety and convenience require that we should adopt the kind of decision to which we now give effect; for if we were to hold that the master was to be responsible only in cases of a negligent obedience to orders, persons would not be protected against many irregularities, such as may happen in conducting the business of railways, against which it is extremely important they should be protected. That is not the present case, but the same considerations apply to it. I have been requested to intimate that my brother Channell concurs in the opinion that the rule ought to be discharged.

MARTIN, B.—The question is, whether there was evidence

on which the jury were justified in finding that the act complained of was authorized by the master. There is no doubt that if a guard, in removing a drunken passenger, exercises unnecessary violence, the master is responsible; for that is an act done in the course of his service in such a manner as to occasion injury to a third party, and according to the general principle the master is responsible. It is true that in the present case no special authority to do this very act was shown; but a master impliedly instructs his servant to do everything properly incident to the matter of his employment. The criterion in determining the question of responsibility is by inquiring whether the act was done by a servant in the course of his employment, and whether the mischief arose from the act being done negligently or in an improper manner. If so, the master is liable. It has been urged that this act was a trespass by the servant. What of that? A great proportion of the cases in which masters have been held liable were trespasses, such as collisions from negligent driving, &c. That is not the distinction. It is this, the master is not responsible for that which is a wilful and malicious act on the part of his servant. There was evidence to go to the jury in this case.

Rule discharged.

HENDERSON *v.* THE NORTHEASTERN RAILWAY CO.

Railway company — Liability for loss of parcel deposited in warehouse.

A warehouseman is not liable for damages resulting from the loss of a parcel committed to his care, but only for the value of the article itself.

This was an action for negligence in the loss of a case entrusted to the care of the defendants. It was tried at the last Liverpool assizes before Keating, J. The defendants paid £20 into court, that being the amount at which the case had been valued by the plaintiff. The jury found a verdict for the defendants. The plaintiff, a commercial traveller, had deposited a case containing patterns in the left-luggage room at one of the defendants' stations. The case was lost. The plaintiff had to procure another case from his employers before he could proceed with his business, and fifteen days elapsed before it could be sent; the plaintiff, therefore, in addition to the value of the case, claimed salary and expenses for fifteen days. At

T. Jones, in support of the rule. The act was a trespass on the part of the conductor. The assault committed on the plaintiff is not one for which the conductor's employer should be held responsible, because the plaintiff at the time was a passenger. Suppose he had authority to expel from the vehicle a person obnoxious to the other passengers, there was no authority in so doing to commit an assault; and the defendant, although he would be liable for an unjustifiable expulsion, cannot be held responsible for the excess of violence of his servant, in expelling a passenger under circumstances which render the expulsion itself justifiable. He cited *McManus* v. *Crickett*, 1 East. 106; *Savignac* v. *Roome*, 6 T. R. 125; *Roe* v. *Birkenhead Railway Co.* 7 Exch. 36.

Pollock, C. B. — I am of opinion that this rule ought to be discharged. The principle by which this question is governed is laid down in *Roe* v. *Birkenhead Railway Co.*, a case which, so far as I am aware, has never been overruled. The conductor was justified in obeying the lawful command of his master in removing a drunken man from the vehicle; but not in doing it with brutality. It was his want of care in executing the command of his master, the defendant, which produced the mischief. The evidence showed that the servant was executing the command of his master with a want of that care and consideration which he was bound to exercise, particularly in a case of this description. The state of the law upon this subject has been very much expanded since the case of *Scott* v. *Shepherd*, 2 Bl. 892, and of *McManus* v. *Crickett*. Any one who reads these cases cannot fail to see that the principle was not then so considered as to work out all the legal considerations attending it. Public safety and convenience require that we should adopt the kind of decision to which we now give effect; for if we were to hold that the master was to be responsible only in cases of a negligent obedience to orders, persons would not be protected against many irregularities, such as may happen in conducting the business of railways, against which it is extremely important they should be protected. That is not the present case, but the same considerations apply to it. I have been requested to intimate that my brother Channell concurs in the opinion that the rule ought to be discharged.

Martin, B.—The question is, whether there was evidence

on which the jury were justified in finding that the act complained of was authorized by the master. There is no doubt that if a guard, in removing a drunken passenger, exercises unnecessary violence, the master is responsible; for that is an act done in the course of his service in such a manner as to occasion injury to a third party, and according to the general principle the master is responsible. It is true that in the present case no special authority to do this very act was shown; but a master impliedly instructs his servant to do everything properly incident to the matter of his employment. The criterion in determining the question of responsibility is by inquiring whether the act was done by a servant in the course of his employment, and whether the mischief arose from the act being done negligently or in an improper manner. If so, the master is liable. It has been urged that this act was a trespass by the servant. What of that? A great proportion of the cases in which masters have been held liable were trespasses, such as collisions from negligent driving, &c. That is not the distinction. It is this, the master is not responsible for that which is a wilful and malicious act on the part of his servant. There was evidence to go to the jury in this case.

Rule discharged.

HENDERSON *v.* THE NORTHEASTERN RAILWAY CO.

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the trial, the learned judge told the jury that they could not take into consideration any resulting damage to the plaintiff.

Monk, Q. C. now moved for a rule for a new trial on the ground of misdirection, and also on the ground that the verdict was against the evidence. He referred to *Hadley* v. *Baxendale*, 9 Ex. 341; 2 W. R. 302. [POLLOCK C. B.—How was the company sued, as warehousemen, or as carriers?] As warehousemen.

POLLOCK, C. B.—I think the ruling of the learned judge was quite right. Warehousemen cannot be made liable beyond the value of the goods entrusted to them. I am of opinion that there should be no rule in this case.

MARTIN, B., concurred.

BRAMWELL, B.—I am of the same opinion, and I think our decision is in conformity with *Hadley* v. *Baxendale*. I do not think that the liability of a railway company for parcels should vary with the consequences of the loss of those parcels; if that were so, it would be impossible to define their liability.

Rule refused.

NOTICE OF NEW PUBLICATION.

BRYANT & STRATTON'S COMMERCIAL LAW FOR BUSINESS MEN, including Merchants, Farmers, Mechanics, etc., and Book of Reference for the Legal Profession, adapted to all the States of the Union; to be used as a text-book for law schools and commercial colleges, with a large variety of practical forms most commonly required in business transactions. By Amos Dean, LL.D., Professor of Law in the Law Department of the University of Albany. 1 vol. pp. 549. New York: D. Appleton & Company, 443 and 445 Broadway. London: 16 Little Britain. 1861.

The preface states that "the design of this work is to present in a condensed form those legal principles which are of the most common use in the various transactions of business. While to the profession it offers a means of easy and ready reference, to the man of business it is presented as a guide, by the aid of which he can avoid those hazards of litigation that so often seriously incommode his progress. It is also intended to supply an educational want, which is becoming more and more imperative as the modes and relations of business grow more complex, intricate, and extended.

"To render the work generally useful for the purposes designed, it is, with few exceptions, confined to the law merchant, and those principles of the common law, the knowledge of which is indispensable to the proper

conducting of business. Very little reference is made to any peculiar provisions of statute or local law, as that is found to vary according to the policy of different States; while the law merchant and the common law are equally applicable to all except Louisiana.

"The experience of the writer in teaching, as well as in practice, has convinced him that the mere presentation of legal principles in the abstract is of little value; and that the only proper method by which they can be acquired, is in connection with the facts and circumstances out of which they arise, through which they are developed, and to which they have a direct and necessary application. To point and apply a principle by its case, serving both as the means of its illustration and the authority upon which it rests, is equally necessary, whether the object be to instruct a class, or to furnish guides to the public, or authority to the judicial tribunals. As this has been generally the plan pursued, it is hoped it may commend it to the profession as a work of reference, to the scholar as the only effectual method of acquiring a knowledge of the law, and to the man of business as both affording the means of a clearer comprehension, and of securing to its guidance a greater degree of safety."

We have taken these large extracts from the preface, which is written in a somewhat peculiar style, in order to give the author an opportunity to state for himself the purposes of the work. The book appears to be a good one, although it has an exceedingly disagreeable title for a law book. What kind of commercial law for business men is Bryant & Stratton's Commercial Law? We are at a loss to know why it was not enough for the author to give us Commercial Law for business men, and not force us to take Bryant & Stratton's Commercial Law. If there must be "a handle" to the book, we should prefer Dean's Commercial Law to that of Bryant & Stratton. The explanation we suppose to be, from the fact that the copyright is taken out in the name of Bryant & Stratton, that the book is named after those who pay for its compilation, as a ship sometimes bears the name of its owner. We hope, however, not to see this instance followed.

The volume is a good one so far as it goes. The body of the book has only four hundred and sixty-nine pages, and it cannot be expected that the various titles of "the Law Merchant" can be fully treated in that space. What is written appears to be well done, and, unlike many of the treatises that profess to be law books for everybody, it contains nothing, so far as we have seen, likely to mislead the unprofessional reader. For the student, to say nothing of the practitioner, it has one good elementary feature. At the end of each chapter there are questions, carefully prepared, relating to all the matters treated of in the chapter. When the student is able to answer all of them correctly, he will have acquired a good knowledge of this department of the law.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencem't of Proceedings		Name of Judge.
		1861.		Returned by
Allen, William H. (1)	Boston,	April,	13,	George F. Choate.
Beal, B. Frank, (2)	Boston,	"	17,	Isaac Ames.
Bestwick, Fred. L.	Dedham,	"	1,	George White.
Bigelow, H. D. P.	Boston,	"	9,	Isaac Ames.
Boston Mechanic'l Bakery,	Boston,	"	10,	"
Brackett, Henry,	Newton,	"	13,	Wm. A. Richardson.
Brisco, Charles,	Springfield,	"	25,	John Wells.
Butler, Henry D. (3)	New York,	"	11,	Isaac Ames.
Caldwell, Ed. J.	Beverly,	"	15,	George F. Choate.
Claflin, Alexander,	No. Bridgewater,	"	1,	Wm. H. Wood.
Claflin, Wm. D. (4)	Holliston,	"	12,	Wm. A. Richardson.
Crocker, Samuel I.	Lawrence,	"	11,	George F. Choate.
Cutting, James A. (3)	Chelsea,	"	11,	Isaac Ames.
Dearborn, David F.	Danvers,	"	11.	George F. Choate.
Duclos Zeen,	Boston,	"	17,	Isaac Ames.
Dunning, John F.	Boston,	"	12,	"
Eldridge, S. A.	Abington,	"	9,	Wm. H. Wood.
Emerson, John,	Boston,	"	12,	Isaac Ames.
Fairbanks, F. D. (2)	Somerville,	"	17,	Isaac Ames.
Fernald, A. W. / Fernald, B. L. (5)	Boston,	"	20,	"
Flanders, John,	Woburn,	"	8,	Wm. A. Richardson.
Foster, Charles F.	Brookline,	"	19,	George White.
Foster, Charles H.	Boston,	"	29.	Isaac Ames.
Freeman, James,	Malden,	"	23,	Wm. A. Richardson.
French, Charles S.	Quincy,	"	8,	George White.
Fuller, George W.	Boston,	"	16,	Isaac Ames.
Greene, Charles A. (6)	Boston,	"	25,	"
Groves, Joseph,	Boston,	"	13,	"
Hanscom, Wm. A.	Boston,	"	3,	"
Hazen Elbridge,	Worthington,	"	25,	Samuel F. Lyman.
Holman, Isaac H.	Watertown,	"	29,	Wm. A. Richardson.
Hoope, Anthony J. (6)	New York,	"	25,	Isaac Ames.
Horton, Edward M. (7)	Reading,	"	15,	Wm. A. Richardson.
Hall, George H.	Saugus,	"	25,	George F. Choate.
Jones, Samuel,	Chelsea,	"	17,	Isaac Ames.
Kilroy, Patrick, / Kilroy, Peter, (8)	Roxbury,	"	12,	George White.
King, Caleb,	Mattapoisett,	"	24,	Wm. H. Wood.
King, Nathaniel G.	Sutton,	"	26.	Henry Chapin.
Lefavour, Charles,	Lynn,	"	13,	George F. Choate.
Merriam, Liberty,	Chelsea,	"	25,	Isaac Ames.
Moulton, Thomas,	Somerville,	"	6,	Wm. A. Richardson.
Newman, Samuel H.	Boston,	"	8,	Isaac Ames.
Peirce, Thomas G.	Foxborough,	"	1,	George White.
Pevere, George B.	Needham,	"	13,	"
Piper, Samuel G.	Lynn,	"	29,	George F. Choate.
Purkee, James H.	Boston,	"	17,	Isaac Ames.
Rich, Thomas W. (4)	Holliston,	"	12,	Wm. A. Richardson.
Sawyer, John, (9)	Boston,	"	9,	Isaac Ames.
Sherburn, James T.	Quincy,	"	3,	George White.
Sleeper, Hanson M. (9)	Boston,	"	9,	Isaac Ames.
Stone, Thorndike B.	Cambridge,	"	2,	Wm A. Richardson.
Taylor, Amos S.	Oxford,	"	26,	Henry Chapin.
Taylor, George (10)	Manchester.	"	30,	George F. Choate.
Thayer, Charles H.	Waltham,	"	3,	Wm. A. Richardson.
Tower, Wm. B.	Dedham,	"	17,	George White.
Tozier, Harston K.	Boston,	"	8,	Isaac Ames.
Travis, Alonzo F.	Natick,	"	23,	Wm. A. Richardson.
Walker, John W. (7)	Charlestown,	"	15,	"
Watson, John H. (10)	Manchester,	"	30,	George F. Choate.
Webber, John P., Jr.	Beverly,	"	13,	"
Wheeler, Asahel,	Newton,	"	6,	Wm. A. Richardson.
White, William F.	Boston,	"	25,	Isaac Ames.
Wilcomb, Joseph D. (4)	Holliston,	"	12,	Wm. A. Richardson.
Williams, Lucien B.	Huntington,	"	20,	Samuel F. Lyman.
Wilson, John, Jr. (2)	Boston,	"	17,	Isaac Ames.
Winchester, Isaac T.	North Chelsea,	"	1,	"

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